Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

DAVID DiGUGLIELMO; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

CURTIS BRINSON,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a state prisoner files a late federal habeas petition, may the federal court equitably toll the statute of limitations without even considering that the prisoner has failed to demonstrate reasonable diligence?

2. Where a district court dismisses a habeas petition without prejudice, but the court changes its mind years later and decides the dismissal was incorrect, is the earlier dismissal an extraordinary impediment to further federal review if the petitioner did not even appeal it?

3. At the very least, should this matter be remanded for reconsideration in light of three recent decisions by this Court – Rhines v. Webber, 125 S.Ct. 1528 (2005); Pace v. Diguglielmo, 125 S.Ct. 1807 (2005); and Gonzalez v. Crosby, 2005 WL 1469516, 2005 U.S. LEXIS 5014 (Jun. 23, 2005) – which held that consideration of the petitioner's diligence in overcoming obstacles to timely filing is mandatory, that months of unexplained delays defeats a claim for equitable tolling, and that a district court's dismissal of a prior habeas petition is not an extraordinary impediment to timely filing if the petitioner did not even appeal it?

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ORDERS AND OPINIONS BELOW

The February 8, 2005, judgment and opinion of the United States Court of Appeals for the Third Circuit, reversing the order of the district court, is reported at 398 F.3d 225 (3d Cir.), and is reprinted in the Appendix at App. 5-25. The March 31, 2005, order of the Third Circuit denying the state's Motion for Rehearing *En Banc* is reprinted in the Appendix at App. 1-2. The June 20, 2001, report and recommendation of the magistrate judge is reprinted in the Appendix at App. 63-72. The July 31, 2001, memorandum and order of the district court rejecting the report and recommendation and referring the case back to the magistrate judge for further proceedings is reprinted in the Appendix at App. 56-62. The October 30, 2002, report and recommendation of the magistrate judge is reprinted in the Appendix at App. 34-55. The November 15, 2002, order of the district court denying the petition for writ of habeas corpus, and approving the report and recommendation, is reprinted in the Appendix at App. 32-33.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a state criminal defendant. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit dated February 8, 2005, reversing the order of the district court and remanding to the district court for an evidentiary hearing. The court denied *en banc* rehearing on March 31, 2005. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d)(1), which provides as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT OF THE CASE

Three eyewitnesses saw appellant Curtis Brinson shoot and kill Arthur Johnson in the bathroom of a nightclub.

During the evening of April 13, 1985, Mr. Johnson and two friends visited Ripley's Discotheque in Philadelphia. While at the club, the three friends visited an upstairs bathroom. As Mr. Johnson was exiting a bathroom stall, three men approached him. One of these men, Brinson, blocked the entrance to the room, as another of them, co-defendant Marvin McAllister, grabbed Mr. Johnson's gold neck chain. Johnson then pushed his way out of the stall and demanded the return of his gold chain. Instead, Brinson pulled out a gun and shot him in the chest. Arthur Johnson died from the gunshot wound shortly thereafter (N.T. 5/2/86, 81, 87, 89-90, 92). The prosecution presented overwhelming evidence of Brinson's guilt, including several eyewitness accounts of the shooting. As a result, Brinson's only option at trial was to argue self-defense.

On May 13, 1986, a jury rejected this defense and convicted Brinson of first degree murder and possession of an instrument of crime. The same jury acquitted McAllister, Brinson's co-defendant. After denying post-verdict motions, the trial court sentenced Brinson to life imprisonment for murder and to a consecutive term of five years probation for possession of an instrument of crime.

Meanwhile, after Brinson's jury had been selected but before the trial began, this Court decided Batson v. Kentucky, 476 U.S. 79 (1986), holding that the discriminatory use of peremptory challenges against African-Americans violates the Equal Protection Clause. Brinson's

attorney had not objected to the prosecution's peremptory challenges as they were made, but attempted to take advantage of the new rule by making a Batson objection after the jury was seated but just before the trial started. While there was some disagreement over how many blacks had been struck, the prosecutor asserted, and the trial court agreed, that three African-Americans had been seated on the jury, the prosecution had accepted one additional African-American venireperson (who had been challenged by the defense), and the prosecutor had six challenges remaining unused at the close of jury selection. Brinson v. Vaughn, 398 F.3d 225, 228 (3d Cir. 2005), App. 9-10. Furthermore, this was not a racially charged case: The defendant, the victim, and the eyewitnesses were all black. The trial judge deferred the Batson issue to post-trial motions, and then rejected it.

Brinson appealed his convictions to the Pennsylvania Superior Court, arguing, *inter alia*, that the prosecutor exercised his peremptory challenges in violation of Batson. The Superior Court affirmed the convictions, Commonwealth v. Brinson, 541 A.2d 1148 (Pa. Super. 1988) (table); and the Pennsylvania Supreme Court denied discretionary review, Commonwealth v. Brinson, 553 A.2d 964 (Pa. 1988) (table).

On September 27, 1993, Brinson filed a *pro se* petition for state collateral review under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, *et seq*. The Philadelphia Court of Common Pleas appointed counsel, who subsequently filed an amended petition. The PCRA court later dismissed this petition. The Superior Court affirmed the dismissal, Commonwealth v. Brinson, 673 A.2d 399 (Pa. Super. 1995) (table); and the Supreme Court denied Brinson's request for discretionary review, Commonwealth v. Brinson, 694 A.2d 619 (Pa. 1996) (table).

After the Pennsylvania Supreme Court denied discretionary review, Brinson filed a petition for writ of habeas corpus in federal court, alleging, *inter alia*, a Batson violation. Brinson claimed to have after-discovered evidence to support the claim, namely, a videotaped lecture from 1986, where the prosecutor in this case, Jack McMahon, expressed his personal views about jury selection. This tape had been created under a prior administration of the Philadelphia District Attorney's Office; it was subsequently rediscovered by the current administration, and it was promptly released to defense lawyers in March, 1997. Brinson argued that, in the tape, McMahon endorsed the racially discriminatory use of peremptory challenges, which, he argued, made it more likely that McMahon had discriminated in this case. Brinson had not, however, first sought state court review of the new evidence.

On September 22, 1997, the Honorable John P. Fullam of the United States District Court for the Eastern District of Pennsylvania dismissed the petition without prejudice for failure to exhaust state court remedies. Brinson v. Vaughn, No. 97-1978 (E.D.Pa. 1997). That is, Judge Fullam recognized that claims of new evidence must first be presented to the state courts, which Brinson had failed to do. Brinson did not appeal the district court's dismissal of his petition.

The PCRA contains a strict, jurisdictional time limit, barring all petitions filed more than one year after final judgment. There is an exception, however, for claims of newly discovered evidence; but even then, any petition must be filed within sixty days after the new evidence was discovered, or could have been discovered. 42 Pa.C.S.A. §§

9545(b)(1)(ii), 9545(b)(2). Despite this looming timeliness issue, Brinson filed nothing for more than ten months. Finally, on July 30, 1998, he filed a second PCRA petition, once again raising a Batson violation. This time, in addition to re-packaging the very same allegations he had made on direct appeal, Brinson made new arguments based on a statistical study and the McMahon videotape.

Brinson conceded in his 1998 PCRA petition that he had known about the prosecutor's alleged pattern of peremptory challenges in his own case since the time of trial, twelve years before; he also admitted that he had been aware of the McMahon videotape for about a year, so even this evidence was not sufficiently "new" to overcome the PCRA's time limit. (Brinson's 1998 PCRA petition is reproduced, in relevant part, at App. 73-75.) Rather, his entire timeliness argument hinged on the newness of his statistics. This "evidence," however, had nothing to do with Brinson's own case – rather, it purported to demonstrate that Brinson's prosecutor, Mr. McMahon, had peremptorily challenged a high number of African-American venirepersons in a small sample of his cases over many years. According to Brinson's PCRA petition, he had become aware of these statistics, prepared for another defendant in another case, in April of 1998. He did not immediately file a PCRA petition even then, however, because his counsel first wanted to "confirm[] these statistics for accuracy," which he apparently accomplished sometime in June of 1998. App. 74-75. About six weeks later, at the end of July, Brinson finally filed his second PCRA petition.

The PCRA court dismissed the petition as untimely. The Superior Court affirmed the dismissal, holding that the statistical evidence was not new at all, but was simply a

reinterpretation of "facts" that could have been discovered years before. Commonwealth v. Brinson, 761 A.2d 1243 (Pa. Super. 2000) (table). The Pennsylvania Supreme Court, on November 14, 2000, denied Brinson's request for discretionary review. Commonwealth v. Brinson, 766 A.2d 1243 (Pa. 2000) (table).

On December 4, 2000, Brinson filed the instant *pro se* Petition for Writ of Habeas Corpus, raising, *inter alia*, the Batson claim based in part on the videotaped lecture. The Commonwealth argued in its Response that this latest petition was time-barred and procedurally defaulted. Magistrate Judge Charles B. Smith issued a report and recommendation concluding that Brinson was indeed time-barred and that he was not entitled to equitable tolling. App. 63-72.

On July 31, 2001, Judge Fullam issued a memorandum and order disapproving the report and recommendation and concluding that Brinson was entitled to equitable tolling. App. 56-62. Judge Fullam explained that he now believed his dismissal of Brinson's first habeas petition to have been incorrect because the claim had already been exhausted on direct appeal; in other words, the district court turned an abrupt about-face, and concluded that there had never been any need for further state court litigation. The matter was then referred back to the magistrate judge.

On October 29, 2002, the magistrate judge recommended that the district court deny Brinson's habeas petition on the merits, reasoning that the state courts had reasonably applied Batson in finding that Brinson had failed to make out a *prima facie* showing of discrimination.

App.34-55. On November 14, 2002, Judge Fullam approved and adopted the report and recommendation. App. 32-33

On September 22, 2003, the United States Court of Appeals for the Third Circuit granted Brinson a certificate of appealability. App. 26-29. After briefing and argument, the Third Circuit reversed and remanded the case to the district court for an evidentiary hearing. App. 5-25. The Court agreed with Judge Fullam that the petition, although untimely, was saved by equitable tolling. The panel disagreed with Judge Fullam, however, on the merits of the Batson claim. The court determined that there had been a *prima facie* showing of discrimination, and that any other conclusion was contrary to, and an unreasonable application of, Batson. The Commonwealth timely sought *en banc* rehearing of the panel's decision, which was denied on March 31, 2005. App. 1-2.

REASONS FOR GRANTING THE WRIT

In the opinion below, the Third Circuit held that Brinson deserved equitable tolling for his late, second federal habeas petition. In doing so, the court *explicitly refused to consider* whether he had acted with "reasonable diligence." This refusal is absolutely contrary to this Court's recent decisions in Rhines v. Webber, 125 S.Ct. 1528 (2005), Pace v. Diguglielmo, 125 S.Ct. 1807 (2005); and Gonzalez v. Corsby, 2005 WL 1469516, 2005 U.S. LEXIS 5014 (Jun. 23, 2005). (All three of these cases – Rhines, Pace, and Gonzalez – were decided after the Third Circuit's decision in this case.)

As explained below, Brinson has no good explanation for the long delays here. Because "petitioner's lack of

diligence precludes equity's operation," Pace, 125 S. Ct. at 1815, this Court should grant the writ of *certiorari* and reverse the opinion below. At the very least, this matter should be remanded to the Third Circuit for reconsideration of Brinson's diligence, as required by Pace, Rhines, and Gonzalez.[1]

I. This Court should grant *certiorari* to affirm that, as a prerequisite to equitable tolling, federal courts *must* require a federal habeas petitioner to demonstrate reasonable diligence in overcoming some extraordinary impediment; Brinson has failed to make this showing.

The Third Circuit found that the district court was wrong to dismiss Brinson's first habeas petition in 1997, and that as a result his second petition, filed three years later, would automatically be deemed timely. Actually, as explained below in footnote 2, the Court of Appeals was wrong in its hindsight re-assessment of the first dismissal – the district court was correct to dismiss the 1997 petition. But even if Brinson's first petition should not have been dismissed, the Third Circuit was wrong to grant equitable tolling without any consideration of Brinson's diligence.

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[1] This Court has reserved the question of whether the habeas time limit can ever be subject to equitable tolling. Pace, 125 S.Ct. at 1814 n.8. Here, as in Pace, there is no need to reach that more fundamental issue, because Brinson has plainly not met any conceivable standards for equitable tolling, so his petition is untimely in any event.

The consideration of Brinson's diligence (or lack of it) is *mandatory*. In Rhines, this Court held squarely that petitioners who return to state court for exhaustion purposes must act with diligence, or else be barred from returning to federal court. 125 S.Ct. at 1535. And in Pace, this Court explained that an unexplained delay of five months, once the habeas time limit has passed, is significant, and fatal to a request for equitable tolling. 125 S.Ct. at 1815. Here, the last portion of delay was twice as long – ten months. Furthermore, the Court in Pace held that equitable tolling is also inappropriate where the petitioner finds himself scrambling after years of inaction to find new facts, and reconfigure old claims. 125 S.Ct. at 1815. The same is true here – Brinson supposedly needed time to uncover more evidence in support of his Batson claim, but he could have developed that evidence years earlier, even as far back as 1988, when he first raised such a claim. Finally, just a few days ago in Gonzalez, this Court held that a petitioner who fails to appeal the district court's dismissal of his first habeas action cannot later claim that same dismissal as an "extraordinary circumstance" justifying future habeas litigation that would otherwise be barred; nor can he claim that he was diligent in his efforts to challenge that first dismissal. 2005 WL 1469516, *7.

The Court of Appeals should have considered these circumstances, and rejected Brinson's claim for equitable tolling.

A. The Third Circuit wrongly refused to consider whether Brinson acted with reasonable diligence.

Assuming that the federal habeas deadline can ever be equitably tolled, a state prisoner who files a late federal

habeas petition, and seeks to equitably toll the one-year deadline, must show two things. First, he must demonstrate that he was prevented from filing a timely habeas petition by an "extraordinary circumstance" beyond his control. Pace, 125 S.Ct. at 1814. Second, he must show that he acted with reasonable diligence in moving his case forward. Id.

As explained below in Section II, the Third Circuit misapplied the "extraordinary circumstance" requirement. But the Third Circuit's most glaring error was its explicit refusal to consider the second part of the equitable tolling inquiry: Whether Brinson had acted with reasonable diligence. In fact, the panel held that Brinson need not have acted with any diligence at all – whenever a district court incorrectly dismisses a habeas petition for lack of exhaustion, the panel concluded, the issue of diligence is simply not relevant.

The court reached this conclusion because it believed, in hindsight, that the district court's dismissal of Brinson's first habeas petition was a mistake. Brinson had exhausted his Batson claim back in 1988, the court concluded; he should not have been sent back to do it again.[2] Even if true,

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[2] The Third Circuit was incorrect to hold that Brinson's direct appeal Batson claim served to exhaust his later allegations based on the McMahon videotape, or his statistical "evidence." In reality, Brinson's original Batson claim was a garden-variety claim of jury discrimination based on the prosecutor's pattern of peremptory challenges at this trial. App. 8-10. That claim was fundamentally altered by these additional arguments, and the state courts were entitled to examine them in the first instance.

(continued ...)

however, this is not by itself enough to justify indefinite tolling. Indeed, the Court of Appeals' approach conflates the two steps of the equitable tolling analysis. That is, an incorrect or misleading judicial decision may, under unusual circumstances, constitute an "extraordinary circumstance," but the petitioner must *also* show that he acted with "reasonable diligence." There is no exception to the Rhines "diligence" requirement for "mistaken" dismissals.

In fact, other Circuits have explicitly rejected the argument that a mistaken dismissal leads to open-ended tolling, and relieves a habeas petitioner from the diligence requirement. For example, in Guillory v. Roe, 329 F.3d 1015 (9th Cir. 2003), the court faced a similar question: Whether Guillory was entitled to equitable tolling where the district court erroneously dismissed his first habeas petition. Guillory argued that all the time between his first and second habeas petitions should be automatically tolled, due to the district court's error. The court disagreed, holding that petitioner still had to demonstrate reasonable diligence:

> Were we to apply [the rule suggested by Guillory], a district court's [error in dismissing a mixed habeas petition] would

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The problem was, Brinson did not seek state review quickly enough, which means that he is now time-barred from returning to state (or federal) court. And even if he could now file a timely new habeas petition, his reconfigured Batson claim would be procedurally defaulted because of the state's untimeliness ruling. See Coleman v. Thompson, 501 U.S. 722, 732 (1991).

> toll the statute of limitations indefinitely. We reject such a rule as not only contrary to our previous cases requiring a petitioner to proceed with reasonable diligence, but also inconsistent with AEDPA's "statutory purpose of encouraging prompt filings in federal court in order to protect the federally system from being forced to hear stale claims."

Guillory, 329 F.3d at 1017 (quoting Carey v. Saffold, 536 U.S. 214, 226 (2002)).

The Ninth Circuit was correct in Guillory. To relieve a state prisoner of his obligation to act with reasonable diligence merely because the district court purportedly made a mistake, makes no sense within the framework of the habeas statute and this Court's precedent. A different approach invites significant diminution of the reasonable diligence standard and the important interest of finality it is supposed to protect. Other circuits, echoing Rhines and Guillory, have similarly recognized the importance of diligence following the dismissal of a mixed petition. See Zarvela v. Artuz, 254 F.3d 374, 380-381 (2d Cir. 2001) (observing that, if equitable tolling were automatic following the dismissal of a mixed petition, a prisoner could take decades to exhaust his state remedies; and therefore holding that prisoners had to do so in reasonable time); Palmer v. Carlton, 276 F.3d 777, 781-782 (6th Cir. 2002) (denying equitable tolling where the prisoner did not act with reasonable diligence after the district court dismissed his first habeas petition without prejudice); Warren v. Garvin, 219 F.3d 111, 113-114 (2d Cir. 2000) (same).

At the very least, then, the court below created a conflict with these other Circuits. But after Rhines, the Third Circuit's position is simply wrong. A state prisoner who seeks federal habeas review, and whose petition is dismissed by the federal courts for lack of exhaustion, *must* litigate thereafter with diligence. A federal court, in considering whether to grant equitable tolling after the petitioner returns to federal court, *must* consider whether he was diligent in pursuing the claim in the interim. Without such an obligation to act diligently, "petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review." Rhines, 125 S.Ct. at 1535.

B. Brinson did not act with reasonable diligence prior to the filing of his late federal habeas petition.

Rhines, Pace, and Gonzalez also provide clear guidance for deciding what is, and is not, diligence. First, in Rhines, the Court endorsed thirty days as a reasonable period for returning to state court to seek exhaustion of a new claim. 125 S.Ct. at 1535. Brinson, however, waited *more than ten times* that long to return to state court. This ultimately delayed his filing of a second habeas petition--a fact apparently lost on the Third Circuit. As discussed further below, Brinson has no legitimate excuse for this protracted delay, and there is consequently no reason to depart from the Rhines appraisal that thirty days is generally long enough for a trip back to state court.

Rhines suggests thirty days as a reasonable amount of time; Pace and Gonzalez, on the other hand, tell us what is *not* diligent. For example, in Pace, this Court held that a prisoner does not act with reasonable diligence when he chooses, after the resolution of a collateral petition

challenging his conviction, to wait five months before initiating a new proceeding. 125 S.Ct. at 1815. Here, after the district court sent Brinson back to state court, he waited more than *twice* that long to file a new petition for state collateral review, delaying the filing of his state petition for over ten months.

There is nothing about the circumstances of this case which would excuse Brinson's ten-month delay. Brinson raised a Batson claim on direct appeal (despite the fact that three African-Americans sat on his jury), and this claim was rejected by the Pennsylvania Superior Court in 1988. Years later, after a full round of state collateral review, Brinson filed his first federal habeas petition in the Eastern District of Pennsylvania. While that petition was pending, there was a new development. In March of 1997, this office (the District Attorney's Office of Philadelphia) released a newly re-discovered training videotape recorded in 1987, in which Brinson's prosecutor, Jack McMahon, described his personal approach to jury selection for a group of junior prosecutors.[3] Many of McMahon's remarks were offensive and most were contradictory; for example, while he stated that some African-Americans were hostile to prosecutors and thus would be pro-defense jurors, McMahon also said that other African-Americans, from other neighborhoods or backgrounds, were "dynamite" jurors from the state's

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[3] Upon discovering this videotape, the Philadelphia District Attorney's Office released copies of it to defendants who were prosecuted by McMahon. McMahon himself left the office many years before, to become a criminal defense attorney.

perspective. App. 50-51. He also suggested that in cases like this one – involving a black victim, with black witnesses, and a black defendant – African-American jurors were actually desirable. App. 51.

After the videotape was released, Philadelphia prosecutors recognized that the McMahon videotape constituted "new evidence" of jury discrimination in cases (like this one) prosecuted by McMahon himself, and therefore, under the state collateral review law, defendants like Brinson could raise claims based on the tape in state court within sixty days of its release. See 42 Pa.C.S.A. § 9545(b)(2) (providing sixty-day window for claims based on new evidence). Once properly before state court, the claims could be reviewed on a case-by-case basis. Many defendants filed on time; some of these prisoners eventually were granted new trials. E.g., Commonwealth v. Basemore, 2005 WL 1189034, 2005 Pa. Super. LEXIS 1308 (May 20, 2005). Others prosecuted by McMahon failed to prove their Batson claims, because the facts of those particular cases failed to support a finding of discrimination. E.g. Commonwealth v. Cook, C.P. 8708-2651 (Phila. Ct. Com. Pl., Mar. 13, 2003).

Brinson, however, did not file a new PCRA petition within sixty days of the videotape's release. Nor did he file a new PCRA petition within sixty days of the federal court's dismissal of his habeas petition. Nor, in fact, did he even take an appeal of the district court's decision. Instead, he waited ten months after that dismissal, some 43 months after the videotape was made public, to file in state court. There is no conceivable theory justifying this delay.

The only explanation offered by Brinson for this period of inaction – and it was uncritically accepted by the

Third Circuit – is that he needed more time to collect evidence in support of his Batson claim. Brinson pointed out below that, under Pennsylvania law, a prisoner who raises a Batson claim in a state appeals court must provide that court with a minimally adequate record to assess the merits of the claim – that is, the race of the jurors peremptorily challenged by the prosecutor, and those accepted by him. Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993). Brinson argued that he had to hire an "expert" to collect this information and allow him to move forward on the claim.

There are several obvious problems with this argument:

- *When Brinson finally filed his late PCRA, it contained none of this supposedly critical evidence.* He simply re-iterated the allegations he had made on direct appeal in 1988, with the addition of the McMahon videotape and an already published statistical analysis of McMahon's strike rates in *other* cases. App. 74. He could have filed the same petition many months earlier.

- *Brinson could have filed his PCRA petition, and afterwards sought additional evidence.* Pennsylvania law freely allows for amendments to petitions, once they are timely filed. Pa. R. Crim. P. 905(A) (providing that amendments are "freely allowed"). Brinson could easily have filed a petition for state collateral review with general allegations in support of his Batson claim (including the videotape), and filled it in

with additional information as it became available. This is routine practice in Pennsylvania. See, e.g., Commonwealth v. Boyd, 835 A.2d 812, 816 (Pa. Super. 2003) (allowing defendant to raise new issues in supplemental PCRA petition). Thus, Brinson was not prevented from timely filing because of evidentiary gaps.

- *Why did Brinson fail to develop this evidence earlier?* Brinson raised a Batson claim on direct appeal; he should have developed all the necessary facts at that point, if not earlier. The information he now says was absolutely critical to state court review – the race of the potential jurors accepted and rejected by the prosecution – was available even at the time of trial. This is important. In Pace, this Court held squarely that years of inaction counts heavily against petitioners who later seek equitable tolling once they are required to act with haste. 125 S. Ct. at 1815.

- *The Third Circuit seriously mischaracterizes the work of Brinson's "expert."* The truth is, Brinson was not collecting so-called "Spence" evidence for the ten months after his federal habeas petition was dismissed. Rather, he happened upon the results of a small-sampled statistical study, prepared by a defense expert in another case, setting out *statistical evidence* about *yet other cases*. App. 74. Brinson was apparently hoping to prove that McMahon historically discriminated in his selection of

> juries, and probably did so in this case, too. This type of evidence is improper. See McCleskey v. Kemp, 481 U.S 279, 297 (1987). For present purposes, though, the important point is that Brinson's excuse for the ten-month delay is not even true. (Indeed, it is not even clear why an "expert" would be necessary to discern the race of the venirepersons accepted and rejected by the prosecutor, as required by Spence, unless Brinson simply did not know these basic facts because he did not preserve the record, which is itself a reason to deny equitable tolling.)[4]

Brinson knew that time was of the essence. When the federal district court dismissed his habeas petition, more than sixty days had elapsed since the release of the McMahon videotape. He had been warned by the district court that there was a potential time-bar problem. He might have argued, as other prisoners in Pennsylvania did, that the sixty

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[4] In fact, this entire "Spence" argument is a classic example of misdirection. Brinson, in raising the Spence argument in the Court of Appeal, was simply trying to take advantage of Holloway v. Horn, 355 F.3d 707, 726 (3d Cir. 2004), in which the Third Circuit held that the Spence rule was inconsistent with Batson. Neither Spence nor Holloway, however, has anything to do with Brinson. He did not present any new "Spence" evidence to the state courts. In his 1998 PCRA petition, he presented a statistical argument based on McMahon's *other* cases, not new evidence of the racial composition of his own venire. App. 74.

days did not start running until his pending collateral litigation was complete. See, e.g., Commonwealth v. Lark, 560 Pa. 487, 494; 746 A.2d 585, 588 (2000). Though this argument would presumably have failed, because there was nothing to prevent Brinson from filing in state court while his federal habeas petition was still pending, the point is that there was no possible legal rationale for waiting *more* than sixty days after the district court dismissed his petition to seek a new round of state review.

Finally, in Gonzalez, this Court held that a habeas petitioner who does not appeal an adverse district court decision cannot later claim that he was "diligent" in seeking review of it. 2005 WL 1469516, *7. This, in itself, defeats Brinson's claim that he was "diligent." That is, Brinson's plea for tolling (and the Third Circuit's grant of it) entirely depends upon the proposition that the district court should not have dismissed his first habeas petition, and its mistaken dismissal put him in a difficult position. But he never appealed the dismissal, and so he can hardly complain about it now.

In short, Brinson waited far too long to file a second petition for state collateral review. His reasons for the delay do not add up. He never sought review of the district court's first dismissal. He was not reasonably diligent, and under the circumstances he does not deserve equitable tolling.

II. The district court's dismissal of Brinson's first federal habeas petition was not an "extraordinary circumstance" justifying equitable tolling.

Apart from the question of diligence, the Third Circuit incorrectly applied the other half of the "equitable

tolling" test, when it decided that the dismissal of Brinson's first habeas petition was an extraordinary impediment that allowed him to ignore the federal time-limit.

It is, of course, a common thing for district courts to dismiss habeas petitions without prejudice, so that the state prisoner can return to the state courts for exhaustion of his claims. If petitioner disagreed with that resolution – that is, if he thought that further state review would be futile – then he could have appealed the district court's decision. But he did not take an appeal. He simply waited for his return to federal court to complain that the district court's decision was incorrect and that it left him without any realistic options.

There is something plainly wrong about this. For one thing, Brinson's failure to take an appeal means that the district court's dismissal became "law of the case," and it is too late to challenge it at this point. See generally Agostini v. Felton, 521 U.S. 203, 236 (1997) (stating that under the "law of the case" doctrine, "a court should not reopen issues decided in earlier stages of the same litigation"). After all, appellate rules are designed to channel complaints about lower court decisions into one time-regulated procedure, rather than allow disappointed litigants to complain about the decision in any forum they please, whenever they want. More fundamentally, Brinson's failure to appeal is yet more evidence of his lack of diligence; if he truly believed himself to be in a bind, then he should have tried to do something about it, by appealing the district court's dismissal *and* by filing in state court with all due haste. But Brinson did neither.

This point was recently confirmed in Gonzalez, where this Court held a district court's mistaken dismissal of a

habeas petition is not an "extraordinary circumstance" justifying further litigation, where the petitioner does not appeal the decision. 2005 WL 1469516, *7.[5] This logic is straightforward: An incorrect decision presents an extraordinary impediment only if the petitioner can do nothing about it. If he does not even try, then he should not later be heard to complain about his predicament.

The point is, where a petition for writ of habeas corpus is dismissed by a federal district court because some or all of the claims therein are unexhausted, the prisoner is not relieved of all responsibility for what happens afterwards. If he disagrees with the district court, he should appeal the dismissal; if he returns to state court, he should do so as quickly as feasible. If he fails to do these things, he is not entitled to equitable tolling. The Third Circuit was wrong to grant Brinson equitable tolling without even considering these circumstances.

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[5] In Gonzalez, the Court examined the meaning of "extraordinary circumstances" within the context of a motion to amend judgment under Fed. R. Civ. P. 60(b), rather than with respect to the equitable tolling standard. But there is no apparent difference between these two uses of the "extraordinary circumstances" test; nor should there be, because in both contexts the phrase is used the same way – to define the petitioner's burden to demonstrate why he should be allowed to proceed with a habeas matter that otherwise would be plainly barred.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*, reverse the judgment below, and dismiss the petition; or, at the very least, this Court should remand the matter for reconsideration based on Rhines, Pace, and Gonzalez.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-4466 & 02-4479

CURTIS BRINSON,
Appellant

v.

DONALD VAUGHN;
THE DISTRICT ATTORNEY
OF THE COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH, and VAN ANTWERPEN, *Circuit Judges*

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Samuel A. Alito, Jr.
Circuit Judge

DATED: March 31, 2005

CRG/cc: Norris E. Gelman, Esq.
Robert M. Falin, Esq.

App. 3

AMENDED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-4466 and 02-4479

CURTIS BRINSON,
Appellant

v.

DONALD VAUGHN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

District Court Judge: Honorable John P. Fullam
(D.C. No. 00-cv-6115)
(D.C. No. 01-cv-3915)

Argued: September 14, 2004

Before: SCIRICA, *Chief Judge*,
ALITO, and AMBRO, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on September 14, 2004. On consideration whereof, it is now here ORDERED and ADJUDGED by this court that the Judgment of the District Court entered on November, 14, 2003, be and the same is hereby, AFFIRMED IN PART and REVERSED IN PART and REMANDED. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Kathleen Brouwer
Acting Clerk

Dated: February 8, 2005

AMENDED PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-4466 and 02-4479

CURTIS BRINSON,
Appellant

v.

DONALD VAUGHN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

District Court Judge: Honorable John P. Fullam
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Argued: September 14, 2004

Before: SCIRICA, *Chief Judge*,
ALITO, and AMBRO, *Circuit Judges*

(Opinion Filed: February 8, 2005)

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OPINION OF THE COURT

ALITO, *Circuit Judge*:

This is an appeal from a District Court order denying Curtis Brinson's petition for a writ of habeas corpus. Brinson was convicted in state court in Pennsylvania on one count of murder in the first degree and a lesser offense and was sentenced to imprisonment for life. The District Court held – and we agree – that his federal habeas petition was timely because it was proper to apply the doctrine of equitable tolling to the period of time following the District Court's erroneous dismissal of Brinson's prior habeas petition. Contrary to the District Court, however, we hold that Brinson made out a prima facie case of a violation of *Batson v. Kentucky*, 476 U. S. 79 (1986), and we therefore reverse the order of the District Court and remand for an evidentiary hearing.

I.

In April 1985, Arthur Johnson was shot and killed in the bathroom of a Philadelphia nightclub. Brinson, an African American, was arrested for the crime, and the selection of the jury for his trial began on April 28, 1986, two days before the Supreme Court of the United States announced its decision in *Batson*.

In *Batson*, the Supreme Court set out a three-step procedure for determining whether a prosecution violated the Equal Protection Clause by peremptorily striking potential jurors based on race.[1] First, the party asserting the claim must make out a prima facie case. *See* 476 U.S. at 96. In order to do this, the party must point to facts that "raise an inference" that a challenged strike was based on an impermissible ground. *Id.* Second, if a prima facie case is established, the party who exercised the challenge must "come forward with a neutral explanation." *Id.* Third, if a neutral explanation is offered, the trial judge must make a finding as to whether the contested peremptory was based on an impermissible ground. *Id.* at 98.

On May 2, 1986 – after Brinson's jury had been selected but before the trial began – his attorney objected that the prosecutor had violated *Batson* by striking prospective

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[1] Although *Batson* concerned prosecution strikes based on race, the decision was later extended to strikes by criminal defendants, *Georgia v. McCollum*, 505 U.S. 42 (1992), and parties in civil cases, *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), and to strikes based on classifications other than race. *See, e. g., J. E. B. v. Alabama ex rel T. B.*, 511 U.S. 127 (1994) (gender).

African American jurors based on race.[2] Brinson's attorney stated that the prosecutor, Jack McMahon, had "exercised fourteen peremptory challenges, thirteen for blacks." He also asserted that McMahon "seldom, if ever, questioned blacks prior to exercising his peremptory challenges." In response, McMahon did not deny using 13 peremptories against blacks, but he stated that he did not remember the race of each juror whom he had peremptorily challenged, that he recalled striking both African Americans and whites, that he had not used all of his allotted strikes, and that three African Americans had been selected for the jury. At this point, neither the trial judge nor the attorneys had actually read *Batson*, and the trial judge announced that he would not rule on the defense objection prior to trial but that the issue could be raised in a post-trial motion. The case was then tried, and Brinson was found guilty of murder in the first degree and possession of an instrument of crime. He was sentenced to life imprisonment.

Brinson again raised the *Batson* issue in a post-trial motion. At the hearing on the motion, Brinson's attorney repeated his previous assertions about McMahon's use of peremptory challenges, and McMahon again disclaimed any memory of how many strikes he had used against African Americans, stating that "[defense counsel] says I used thirteen strikes on Blacks and one on [a] White. I see nothing in the record to indicate that. I do not have any recollection of

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[2] The voir dire took place before *Batson* was handed down, and Brinson's attorney did not object when the prosecutor made the peremptory challenges. As a result, the transcript does not reveal the race of the individuals whom the prosecution struck. The state courts did not hold, and the Commonwealth does not contend in this appeal, that Brinson procedurally defaulted his *Batson* claim by failing to raise an objection at the time when the challenges were exercised.

that whatsoever. I am sure the Court does." To this, the trial judge responded: "Yes, I do." McMahon then stated: "Be that as it may, I know I accepted the Black that the Defense struck."

The trial judge orally rejected Brinson's *Batson* argument on the ground that *Batson* had "not yet been accepted by this Commonwealth." The trial judge appears to have believed that he was still bound by pre-*Batson* Pennsylvania court decisions rejecting arguments similar to the one that the Supreme Court of the United States accepted in *Batson*.

The trial judge died before he could write an opinion addressing Brinson's post-trial motions, and the matter was reassigned to another judge. In his opinion on these motions, the new judge wrote the following with respect to Brinson's *Batson* argument:

> In the instant case the record indicates there were at least three black persons on the jury and the selection of the jury was completed with the prosecutor still having six [peremptory] strikes . . . . Thus, the record does not show any deliberate, purposeful exclusion of black persons from the jury in this case. Unfortunately, the trial judge died before writing his Opinion, and, therefore, we are without the benefit of his personal observations as he conducted the voir dire. However, we have, as was stated [in *Batson*[3]], confidence, based upon the experience, character and reputation of [the trial judge], that he would not allow such a purposeful rejection of

[3] *See* 476 U.S. at 97.

> black persons solely by [peremptory] challenges as to deny this Defendant a fair jury trial.

On direct appeal, Brinson again raised the *Batson* issue, but the Superior Court affirmed Brinson's conviction. Invoking *Commonwealth v. McKendrick*, 514 A.2d 144 (1986), the Superior Court rejected the *Batson* claim on the ground that "where the victim, the perpetrator and witnesses are black, a prima facie case of racial discrimination is not present under *Batson* . . . ." The Superior Court continued:

> In addition, the record establishes that three of the jurors in this case were black, the defense struck blacks, and the Commonwealth had six peremptory challenges left following the close of jury selection . . . . Accordingly, appellant has failed to establish that the prosecutor exercised peremptory challenges to remove black venire members, as required by [*Batson*]. An evidentiary hearing on this issue is not required.

Brinson raised his *Batson* claim in a petition for allocatur to the Pennsylvania Supreme Court, but the petition was denied.

In September 1993, Brinson filed a petition in state court under the Pennsylvania Post-Conviction Relief Act (PCRA). That petition claimed that trial counsel had been ineffective because, among other things, he had allegedly failed to object to the prosecution's systematic exclusion of African Americans from the jury.[4] Brinson's petition was

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[4] The ineffective assistance of counsel claim identified six

(Continued)

denied without a hearing in January 1995. A timely appeal was taken, but the Superior Court affirmed the dismissal for two reasons: first, that the *Batson* claim had been litigated on direct appeal and therefore could not be raised under the PCRA, *see* 42 Pa. Con. Stat. Ann. § 9544(a)(3), and, second, that all of Brinson's claims were waived because Brinson allegedly failed to include a trial transcript as part of the official record. The Pennsylvania Supreme Court again denied allocatur.

Following the dismissal of his first PCRA petition, Brinson turned to the federal courts and filed a timely pro se petition for a writ of habeas corpus in which he presented eight grounds for relief, including his *Batson* claim.[5] While this petition was pending, a videotape entitled "Jury

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(Continued)

failures by defense counsel: (1) failing to object to the systematic exclusion of African-Americans from the jury; (2) failing to preserve for appeal the denial of petitioner's motion for severance; (3) failing to challenge and preserve for appeal the issue of whether the prosecutor violated the rules of discovery; (4) failing to challenge and preserve for appeal the propriety of the prosecutor's questions regarding petitioner's post-arrest silence; (5) failing to challenge the admission of hearsay testimony; and (6) failing to challenge the prosecutor's reference to petitioner's post-arrest silence during summation.

[5] The additional grounds for relief in this petition were: (1) the state courts incorrectly concluded that some of his claims were waived; (2) trial counsel was ineffective in failing to move for severance of his trial from that of his co-defendant; (3) the Commonwealth failed to provide complete discovery; (4) the prosecutor violated due process by questioning him about post-arrest silence; (5) trial counsel was ineffective in failing to object to

(Continued)

Selection with Jack McMahon" was released to the public. This tape depicted a training session in which McMahon advocated the use of peremptory challenges against African Americans. After the tape was released, Brinson filed a motion requesting that the District Court take judicial notice of the new evidence.

The Magistrate Judge to whom the federal habeas petition was assigned for a report recommended that the petition be dismissed without prejudice on the ground that the *Batson* claim, as bolstered by the McMahon tape, was unexhausted and that the petition therefore contained both exhausted and unexhausted claims. The Magistrate Judge noted that the *Batson* issue had been litigated in state court on direct appeal and that the PCRA generally precludes re-litigation of claims, but the Magistrate Judge observed that the PCRA's one-year filing deadline contains an exception for claims predicated on facts that were previously unknown to the petitioner and that could not have been discovered through the exercise of due diligence. *See* 42 Pa. Cons. Stat. Ann. § 9545(b)(1)(ii). The District Court adopted this recommendation and dismissed the petition without prejudice on September 22, 1997.

Unfortunately, the District Court did not note that, by the time of its decision, the PCRA time limit for filing a claim based on newly discovered evidence – 60 days from the discovery of the evidence (see 42 Pa. Cons. Stat. Ann. § 9545(b)(2)) – had already passed. Moreover, in order to proceed with a new PCRA petition raising his *Batson* claim,

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(Continued)

hearsay testimony; (6) co-defendant's girlfriend was improperly permitted to testify; and (7) the prosecutor made improper statements during his closing arguments.

Brinson felt that he was required to comply with the so-called "Spence rule," *see Commonwealth v. Spence*, 627 A.2d 1176 (Pa. 1993), and thus to identify the race of "the veniremen who had been removed by the prosecution, the race of all the jurors who served, [and] the race of jurors acceptable to the Commonwealth who had been stricken by the defense." *Id.* at 1182-83.[6] With the assistance of a law professor, Brinson spent 10 months attempting to compile these statistics. Brinson eventually filed his second PCRA action on July 30, 1998, but the PCRA court dismissed the petition as untimely, and the Superior Court affirmed.

On December 4, 2000, Brinson returned to federal court and filed a second habeas petition in which he raised the same claims presented in his first petition. The Magistrate Judge recommended that the petition be dismissed as untimely, but the District Court did not adopt this recommendation, ruling that the running of the statute of limitations should be equitably tolled for the time period following the dismissal of the timely, first petition in September of 1997. The District Court reached this conclusion for two reasons. First, the Court stated that it had erred in dismissing Brinson's first, timely petition. The Court explained:

> The *Batson* issue had actually been presented to the state courts on direct appeal and in the first PCRA application. My conclusion that considerations of comity would best be served by permitting the state courts an opportunity to reconsider the issue in light of the recent disclosure of the McMahon tapes turned out

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[6] We have held that the *Spence* rule is inconsistent with *Batson*. *See Holloway v. Horn*, 355 F.3d 707, 728-29 (3d Cir. 2004).

> to be unduly generous to the Commonwealth; petitioner's right to seek federal habeas relief should not be lost entirely, merely because of this Court's excessive deference to the state tribunals.

Second, the District Court stated that, even if Brinson had not exhausted his *Batson* claim on direct appeal, "it would have been preferable to stay, rather than dismiss, the first federal petition."

The District Court returned the case to the Magistrate Judge for a recommendation on the merits of the *Batson* claim, and the Magistrate Judge concluded, in an opinion adopted by the District Court, that Brinson had failed to establish a prima facie case under *Batson*. The Magistrate Judge opined that the record did not support a finding that McMahon had in fact used 13 of his 14 peremptory strikes against African Americans and that the McMahon tape, though "troubling," did not establish that McMahon had used impermissible tactics during Brinson's trial.

Brinson then took this appeal, claiming that the District Court erred in denying his *Batson* claim and in dismissing his additional claims *sub silentio*. The respondents (hereinafter "the Commonwealth") counter that the District Court should not have equitably tolled the statute of limitations but that, in any event, Brinson's Batson claim was properly rejected on the merits.

II.

We first consider the question whether, as the District Court held, it was proper to toll the statute of limitations for the period from the dismissal of Brinson's first federal

habeas petition until the filing of his current petition. It is settled that the one-year statute of limitations for filing a federal habeas claim under 28 U.S.C. § 2254 is subject to equitable tolling, *see Miller v. New Jersey State Dept. Of Corr.*, 145 F.3d 616, 618-19 (3d Cir. 1998), but that the doctrine should be invoked "sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). We have said that equitable tolling is proper when the party in question "has in some extraordinary way been prevented from asserting his or her rights." *Brown v. Shannon*, 322 F.3d 768, 773 (3d Cir. 2003). One such potentially extraordinary situation is where a court has misled a party regarding the steps that the party needs to take to preserve a claim. *See, e. g., Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (referring to situation in which "the court has led the plaintiff to believe that she has done everything required of her"); *Hallgren v. U.S. Dept. of Energy*, 331 F.3d 588, 590 (8th Cir. 2003); *Lambert v. United States*, 44 F.3d 296, 299 (10th Cir. 1995); *Rys v. U.S. Postal Serv.*, 886 F.2d 443, 447 (1st Cir. 1989). In this case, the District Court held that equitable tolling was justified on this ground.

We have never decided what standard of appellate review should govern when a District Court applies the doctrine of equitable tolling in a habeas case, and the circuits are divided on the issue, with some applying de novo review, some using an abuse-of-discretion standard, and some employing different standards in different circumstances. *See Neverson v. Farquarson*, 366 F.3d 32, 42 n. 11 (1st Cir. 2004); *Rouse v. Lee*, 339 F.3d 238, 248 n.7 (4th Cir. 2003) (collecting cases). On balance, we are inclined to believe that where, as here, the relevant facts are not disputed, a District Court's decision on the question whether a case is sufficiently "extraordinary" to justify equitable tolling should be reviewed de novo.

Three factors point in this direction. First, a District Court does not have any comparative advantage in deciding whether particular circumstances are extraordinary enough to warrant the application of the doctrine. Second, reversal of a District Court's ruling on this issue will not lead to a retrial or any other comparably burdensome proceedings. Third, de novo review leads to greater uniformity in the application of the doctrine and better serves the goal of ensuring that the doctrine is indeed used "sparingly" and is not employed to upset the strong concern for finality embodied in 28 U.S.C. § 2254.

In the present case, however, it is not necessary for us to resolve this question, because we would sustain the District Court's decision on the issue of equitable tolling under any of the standards used by other courts of appeals. We conclude that the District Court's mistaken dismissal of Brinson's first petition prevented Brinson in a sufficiently extraordinary way from asserting his rights under the federal habeas statute. As the District Court ultimately recognized, Brinson had fully exhausted his *Batson* claim on direct appeal. It was therefore error for the District Court to dismiss his first federal habeas petition on the ground that this claim was not exhausted. In dismissing that petition, the District Court reasoned that Brinson's request for judicial notice of the McMahon tape transformed his *Batson* claim into one that differed from the claim raised on direct appeal, but this reasoning was flawed.

First, it is questionable whether Brinson's reliance on the McMahon tape fundamentally altered the previously exhausted claim because the tape merely confirmed the factual predicate of Brinson's *Batson* claim without changing its legal basis. *See Vasquez v. Hillery*, 474 U.S. 254, 258

(1986); *Stevens v. Del. Corr. Ctr.*, 295 F.3d 361, 369 (3d Cir. 2002); *Landano v. Rafferty*, 897 F.2d 661, 673 (3d Cir. 1990). Second, as we explain in part III of this opinion, without the tape, Brinson had a meritorious claim that his trial attorney established a prima facie case under *Batson* and that the state courts violated *Batson* by failing to move on to the second and third steps of the *Batson* inquiry. Under these circumstances, the District Court, at a minimum, should have given Brinson the option of going forward with the precise claim that was advanced on direct appeal.[7] *See Rose v. Lundy*, 455 U.S. 509, 510 (1982) (when petition is "mixed," petitioner must be given "choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court"). Instead, the District Court relegated Brinson to another round of state court litigation that was bound to fail because the 60-day period for raising a claim founded on newly discovered evidence had already passed.

The Commonwealth contends that Brinson did not act with the requisite "reasonable diligence" because he was allegedly dilatory in filing his second PCRA petition. The Commonwealth first faults Brinson because, when the McMahon tape was released, he did not file his second PCRA petition within 60 days thereafter but instead elected to proceed with his first federal habeas petition. The Commonwealth also argues that Brinson did not exhibit "reasonable diligence" because he did not file his second PCRA petition within 30 or 60 days after the District Court's dismissal of the first federal petition. The Commonwealth takes

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[7] It is unresolved whether additional claims presented in the first petition were unexhausted, but if they were, Brinson should have been given the choice of proceeding with the exhausted *Batson* claim and any other exhausted claims.

the figure of 30 days from our decision in *Crews v. Horn*, 360 F.3d 146 (3d Cir. 2004), in which we held that, where a District Court stays a mixed petition so that the petitioner can exhaust unexhausted claims, the petitioner must file in the state court within 30 days after the entry of the stay. The Commonwealth takes the figure of 60 days from *Commonwealth v. Lark*, 746 A.2d 585 (Pa. 2000), in which the Pennsylvania Supreme Court held that, when a ground for filing a second PCRA petition (such as the discovery of new evidence) arises while a previous PCRA action is still pending, the second petition is timely if it is filed within 60 days after the final resolution of the previous PCRA action.

Whatever other flaws these arguments may have, they all fail for the simple reason that Brinson, having already fully exhausted his *Batson* claim, had no obligation to file in state court *at all*. Consequently, he cannot be faulted for failing to file such a petition within any of the time periods suggested by the Commonwealth. We thus hold that the District Court did not err in equitably tolling the statute of limitations.

III.

A.

We now consider the merits of Brinson's *Batson* claim. Because this claim was "adjudicated on the merits" in state court, the standards of review set out in 28 U.S.C. § 2254(d) apply. We must thus decide whether the state courts' "adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d)(1).

A state court adjudication is "contrary to" Supreme Court precedent if it results from the application of "a rule that contradicts the governing law set forth" by the Supreme Court or is inconsistent with a Supreme Court decision in a case involving "materially indistinguishable" facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). "A state court decision fails the 'unreasonable application' prong . . . 'if the court identifies the correct governing rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case or if the state court either unreasonably extends a legal principle from the Supreme Court's precedent to a new context where it should not apply or unreasonably refuses to extend the principle to a new context where it should apply.'" *Rico v. Leftridge-Byrd*, 340 F.3d 178, 181 (3d Cir. 2003) (quoting *Gattis v. Snyder*, 278 F.3d 222, 234 (3d Cir. 2002)).

B.

In the present case, the explanations given by the state trial and appellate courts were all "contrary to" *Batson*, or at least represented unreasonable application of that precedent. First, the trial judge's statement that *Batson* had "not yet been accepted by [the] Commonwealth" requires no comment.

Second, contrary to the post-trial opinion and the opinion of the Superior Court, a prosecutor may violate *Batson* even if the prosecutor passes up the opportunity to strike some African American jurors.[8] *Batson* was "designed

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[8] As noted, the post-trial opinion rejected Brinson's *Batson* claim because, among other things, "there were three black

(Continued)

to ensure that a State does not use peremptory challenges to remove *any* black juror because of his race." 476 U.S. at 99 n.22 (emphasis added). Thus, a prosecutor's decision to refrain from discriminating against some African American jurors does not cure discrimination against others.

Third, the opinion on the post-trial motion was plainly incorrect in suggesting that the trial judge must have found that the prosecutor had not discriminated in the use of peremptories and in deferring to that supposed finding. The trial judge never made any findings about the prosecutor's reasons for his strikes, and the trial judge did not follow the three-step process outlined in *Batson*. The trial judge did not decide whether Brinson's attorney had pointed to facts that established a prima facie case; the trial judge did not call upon the prosecutor to state his reasons for the contested strikes; and, as noted, the trial judge made no findings as to whether the prosecutor had followed a strategy of discrimination.

Fourth, the Superior Court was clearly wrong in holding that "where the victim, the perpetrator and witnesses are black, a prima facie case of racial discrimination is not present under *Batson*." *Batson* held that a prima facie case is established when "all relevant circumstances" give rise to "the necessary inference of purposeful discrimination." 476 U.S. at 96. *Batson* is very clear that such an inference may

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(Continued)

persons on the jury and the selection of the jury was completed with the prosecutor still having six [peremptory] strikes." Similarly, the Superior Court rejected the *Batson* claim in part because "there were at least three black persons on the jury and the selection of the jury was completed with the prosecutor still having six [peremptory] strikes."

be created by a variety of different circumstances. *See id.* at 96-97. The Court wrote:

> For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. *These examples are merely illustrative.*

Id. at 97 (emphasis added). To be sure, the race of a victim, the witnesses, and the defendant may be *relevant* because these facts may have a bearing on a prosecutor's motivation to use racially based strikes in a particular case, *see United States v. Clemons*, 843 F.2d 741, 747 (3d Cir.), *cert. denied*, 488 U.S. 835 (1988), but the rigid formula invoked by the Superior Court cannot be reconciled with *Batson*.

Finally, the Superior Court's reliance on the fact the "the defense struck blacks" was misplaced. Suppose that the defense dismisses a particular African American juror for a permissible non-racial ground and that the prosecution then strikes other African American jurors based on their race. The legitimate defense strike would not open the door for illegitimate prosecution strikes. Indeed, even if the defense itself violated equal protection by striking a potential juror based on race, this would not justify further constitutional violations by the prosecution. On the contrary, both the defense and prosecution strikes would be illegitimate. In sum, the various reasons given by the state courts for rejecting Brinson's *Batson* claim will not bear analysis.

C.

The District Court, as noted, held that Brinson's attorney did not point to facts that made out a prima facie case. We must disagree. We hold that any decision to this effect by the state courts would represent an unreasonable application of *Batson*.

1. The District Court concluded that the state court record does not support Brinson's allegation that the prosecutor used 13 of his 14 peremptories against African Americans. In our view, however, the state court record compels such a finding.

As noted, Brinson's attorney first made this allegation shortly after jury selection was completed, and McMahon's response was telling. McMahon did not deny that he had used 13 of 14 strikes against African Americans. Nor did he deny that he had used all but one of his strikes against African Americans. Nor did he deny that he had used most of his strikes against African Americans. Nor did he say that, while unable to recall the exact figures, he remembered that his pattern of strikes was not anything like that alleged by the defense. Instead, he merely stated: "I don't know how many blacks or whites I struck. I know I struck both, that is a fact." This was a statement that McMahon could truthfully make so long as he did not recall the precise statistics – 13 of 14 strikes used against African Americans – that the defense alleged. If McMahon thought that the pattern might have been slightly different – say, 14 of 15 or 12 of 14 – McMahon could assert without fear of sanction from the trial judge that he did not know "how many blacks or whites [he] struck."

McMahon's comments – and those of the trial judge – at the post-trial proceeding were also revealing. When the trial judge announced that he was not going to rule on the *Batson* objection before trial but would return to the issue, if necessary, after the trial, McMahon was put on notice regarding the significance of the defense allegation. By the time of the post-trial hearing, McMahon had had time to digest *Batson* and to attempt to reconstruct the jury selection process, but McMahon again declined to contest the defense allegation. At the post-trial hearing, defense counsel repeated his charge that McMahon had used 13 of 14 strikes against African Americans and added: "I know Your Honor has notes with respect to this." McMahon then stated: "I do not have any recollection of that whatsoever. I am sure the Court does." The trial judge responded: "Yes, I do." McMahon then stated: "Be that as it may . . . ."

In context, McMahon's responses were tantamount to an admission that his pattern of strikes was at least similar to that alleged by the defense. There is simply no other plausible explanation for his vague responses on two separate occasions. The trial judge's comments are also suggestive. If the judge's notes or recollection differed markedly from the facts claimed by the defense, it seems most unlikely that he would have failed to note that point on the record. For all these reasons, we conclude that the state court record compels the conclusion that the prosecution's peremptory challenges were exercised in accordance with the pattern alleged by the defense or a very similar pattern.

2. The pattern of strikes alleged by the defense is alone sufficient to establish a prima facie case under the circumstances present here. In *Batson*, as noted, the Supreme Court stated that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an

inference of discrimination." 476 U.S at 97. The stark pattern here qualifies. Such a pattern, of course, does not necessarily establish racial discrimination, but particularly in the absence of any circumstance (such as a venire composed almost entirely of African Americans) that might provide an innocent explanation, such a pattern is more than sufficient to require a trial court to proceed to step two of the *Batson* procedure. *See Holloway v. Horn*, 355 F.3d 707, 722 (3d Cir. 2004) (finding prima facie case established when prosecutor used 11 of 12 strikes against African Americans).

This conclusion is not undermined by the fact that other factors suggestive of possible racial discrimination on the part of the prosecution are not present in the record of this case. In *Clemons*, 843 F.2d at 748, we noted that, in addition to a suspicious pattern of strikes, other factors that may be important in determining whether a prima facie case has been made out include an attorney's questions and statements during the selection process, the nature of the crime, and the race of the defendant and the victim. Here, we are not aware of any suspicious questions or statements made by the prosecution during the jury selection process, and it does not appear that the crime was racially charged. But the question whether a prima facie case has been established must be judged based on all relevant circumstances; no rigid test need be satisfied; and in some cases, a prima facie case may be made out based on a single factor. This is such a case.

IV.

We hold that the state courts' rejection of Brinson's *Batson* claim without proceeding to the second step of the *Batson* analysis cannot be sustained under 28 U.S.C. § 2254(d)(1). We therefore reverse the order of the District Court and remand. On remand, the Commonwealth should

be given the opportunity to provide legitimate reasons for any strikes against African Americans. If it is unable to provide such explanations, Brinson will be entitled to habeas relief. If the Commonwealth is able to provide nondiscriminatory reasons for the strikes, then the District Court will be required to make findings as to whether the strikes were based on race.[9]

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[9] Unless the District Court determines that Brinson is entitled to relief on his *Batson* claim, the District Court on remand must also address the other claims set out in Brinson's habeas petition.

BPS-301 August 28, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. **02-4466**

CURTIS BRINSON

VS.

DONALD VAUGHN, ET AL.

(E.D. PA. CIV. NO. 00-CV-06115)

Present: BARRY, AMBRO AND CHERTOFF,
CIRCUIT JUDGES

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253 (c)(1); and

(2) Appellee's memorandum of law in opposition thereto

in the above-captioned case.

Respectfully,

Clerk

MMW/KCW/nf/crg

ORDER

The foregoing request for a certificate of appealability is granted, as the appellant has made a substantial showing of a denial of a constitutional right. *See* 28 U.S.C. § 2253(c). Jurists of reason could debate the District Court's conclusion that the appellant failed to state a prima facie case of racial discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986). *See Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003). We also grant a certificate of appealability on the questions of whether any of appellant's remaining claims in this habeas petition were exhausted and thus properly before the District Court and, if so, whether this matter should be remanded for consideration of the merits of such claim(s). The Clerk shall consolidate this appeal with the appeal at C.A. No. 02-4479 for purposes of briefing and disposition.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: SEP 22 2003

CRG/cc: NEG
RMF

BPS-302 August 28, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 02-4479

CURTIS BRINSON

VS.

DONALD VAUGHN

(E.D. PA. CIV. NO. 01-CV-03915)

Present: BARRY, AMBRO AND CHERTOFF,
CIRCUIT JUDGES

Submitted is appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

MMW/KCW/nf/crg

ORDER

The foregoing request for a certificate of appealability is granted, as the appellant has made a substantial showing of a denial of a constitutional right. *See* 28 U.S.C. § 2253(c).

Jurists of reason could debate the District Court's conclusion that the appellant failed to state a prima facie case of racial discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986). *See Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003). We also grant a certificate of appealability on the questions of whether any of appellant's remaining claims in this habeas petition were exhausted and thus properly before the District Court and, if so, whether this matter should be remanded for consideration of the merits of such claim(s). The Clerk shall consolidate this appeal with the appeal at C.A. No. 02-4466 for purposes of briefing and disposition.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: SEP 22 2003

CRG/cc: NEG
RMF

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRINSON	:	CIVIL ACTION
	:	
v.	:	
	:	
VAUGHN, et al.	:	NO. 01-3915

ORDER

AND NOW, this 13th day of January, 2003, IT IS ORDERED

That the Motions for Reconsideration of Habeas Denial and for Certificate of Appealability and for Leave to Proceed In Forma Pauperis are DENIED. The Motions have been ruled upon in Civil Action No. 00-6115.

/s/
John P. Fullam, Sr. J.

FILED: JAN 13, 2003
ENTERED: JAN 13, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CURTIS BRINSON	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD VAUGHN, et al.	:	NO. 00-6115

ORDER

AND NOW, this 12th day of December, 2002, IT IS ORDERED that petitioner's Motion for Reconsideration is DENIED.

/s/
John P. Fullam, Sr. J.

FILED: DEC 12, 2002
ENTERED: DEC 13, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CURTIS BRINSON, Petitioner	:	CIVIL ACTION NO. 00-6115
VS.	:	CIVIL ACTION NO. 01-3915
DONALD VAUGHN, AND THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, AND THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents	:	

FILED: NOV 14 2002
ENTERED: NOV 15 2002

ORDER

AND NOW, to wit, this 14th day of November, 2002, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. Section 2254, is DENIED.

3. There is no probable cause to issue a certificate of appealability.

It is so ORDERED.

BY THE COURT:

/s/
JOHN P. FULLAM, J.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CURTIS BRINSON, Petitioner	:	CIVIL ACTION NO. 00-6115
VS.	:	CIVIL ACTION NO. 01-3915
DONALD VAUGHN, AND THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, AND THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents	:	

FILED: OCT 29 2002
ENTERED: OCT 30 2002

REPORT AND RECOMMENDATION

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

Currently before the Court is a Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. § 2254, by a prisoner incarcerated in the State Correctional Institution at Graterford, Pennsylvania. For the reasons which follow, it is recommended that the petition be denied and dismissed in its entirety.

PROCEDURAL HISTORY

Following a jury trial presided over by the Honorable Eugene Gelfand in the Philadelphia Court of Common Pleas, petitioner was convicted, on May 12, 1986, of first-degree murder and possession of an instrument of crime.[1] Judge Gelfand denied post-verdict motions and sentenced petitioner to life imprisonment on the murder charge, together with a consecutive term of five years probation for the weapons offense. On appeal to the Pennsylvania Superior Court, petitioner alleged, in part, that the prosecutor improperly used his peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). The Superior Court affirmed both convictions, *Commonwealth v. Brinson*, 541 A.2d 1148 (Pa. Super. 1988), and, on November 22, 1988, the Pennsylvania Supreme Court denied allocatur. *Commonwealth v. Brinson*, 553 A.2d 964 (Pa. 1988).

Approximately five years later, on September 27, 1993, petitioner sought relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, *et seq*. The PCRA court appointed counsel, who subsequently filed an amended petition. Upon consideration of the new

[1] The facts are as follows:

During the night of April 13, 1985, the decedent, Arthur Johnson, and two friends went to a club in Philadelphia. At some point, they went to an upstairs bathroom. As the decedent attempted to exit a bathroom stall, three men, including the petitioner, approached him blocking the entrance. Co-defendant, Marvin McAllister grabbed the decedent's gold neck chain and yanked it off. The decedent then pushed his way out of the stall and demanded the return of his chain. In response, petitioner pulled out a gun and shot him in the chest. Decedent died shortly thereafter (N.T. 5/2/86, 81, 87, 89-90, 92).

petition, the PCRA court dismissed it on the merits. The Superior Court affirmed the dismissal, *Commonwealth v. Brinson*, 673 A.2d 399 (Pa. Super. 1995), and, on December 11, 1996, the Pennsylvania Supreme Court denied allowance of appeal. *Commonwealth v. Brinson*, 694 A.2d 619 (Pa. 1996).

In March of 1997, petitioner filed a federal petition for writ of habeas corpus asserting, in part, a *Batson* violation. In support of this filing, petitioner argued that he had after-discovered evidence to bolster his claim. Specifically, he asserted that a videotaped lecture from 1986, which was publicly released in 1997, revealed the prosecutor endorsing the use of discriminatory peremptory challenges.[2] Based on a report and recommendation issued by the undersigned, this Court dismissed the petition without prejudice on September 22, 1997, for failure to exhaust state court remedies.

Petitioner returned to the state courts on July 30, 1998, to file a second PCRA opinion, this time alleging a *Batson* violation based on a "newly-discovered" statistical study regarding race-based use of peremptory challenges. After the PCRA court dismissed the petition as untimely, the Superior Court affirmed the dismissal on the grounds that the statistical study did not constitute newly-discovered evidence. *Commonwealth v. Brinson*, 761 A.2d 1243 (Pa. Super. 2000). On November 14, 2000, the Pennsylvania Supreme Court denied allocatur. *Commonwealth v. Brinson*, 766 A.2d 1243 (Pa. 2000).

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[2] Such tape, made by the assistant district attorney at the time in this case, was entitled, "Jury Selection with Jack McMahon", and is generally referred to as the "McMahon Tapes." Excerpts from such will be provided *infra*.

Petitioner filed the instant Petition for Writ of Habeas Corpus on December 4, 2000, setting forth the following claims for relief:

1. Petitioner's rights to a fair trial were denied by the prosecutor systematically excluding black veniremen from the jury;

2. Trial counsel was ineffective for failing to request a severance of petitioner's case from that of his co-defendant;

3. Petitioner's rights were violated by the Commonwealth's failure to provide complete discovery;

4. Petitioner was denied due process of law by the prosecutor being permitted to question petitioner regarding his post-arrest silence;

5. Trial counsel was ineffective for failing to raise the issue of hearsay testimony of Lt. McGowan; Petitioner was denied a fair trial by the trial court permitting the co-defendant's statement to Deborah Richardson;

6. The closing remarks of the prosecutor were prejudicial.

7. The petitioner's equal protection rights were violated based on racial discrimination in selecting the jury;

8. The state court erred by refusing to grant a hearing concerning the *Batson* violation,

which would be supported by the statistical study and the Jack McMahon video tapes.

On June 19, 2001, I filed a Report and Recommendation concluding that petitioner's habeas petition was time barred and that he was not entitled to equitable tolling. On July 31, 2001, the Honorable John J. Fullam issued a Memorandum and Order rejecting the Report and Recommendation concluding that petitioner was entitled to equitable tolling and that his *Batson* claim based on the videotaped lecture was not procedurally defaulted. The matter was then referred back to me and I ordered the respondents to file an answer in accordance with Judge Fullam's Memorandum and Order.[3] The Order also stated that the respondent(s) shall produce copies and transcripts of the Philadelphia District Attorney's training tapes also known as the "McMahon Tapes." Respondents subsequently filed an answer[4] and a transcript of the tapes. Sometime thereafter, they provided a copy of the tape.[5] Petitioner continued to file a number of motions,

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[3] It is clear from Judge Fullam's memorandum that the only issue that petitioner has viable in this habeas petition is the *Batson* issue. *See Brinson v. Vaughn*, No. 00-6115, Memorandum and Order, July 31, 2001. Thus, in accordance with such, this is the only issue that will be addressed.

[4] In its response, the Philadelphia District Attorney's office addressed the merits of the *Batson*'s claim. It, however, also stated that for purposes of preserving its arguments on appeal, it was including arguments that the petition is time-barred and not entitled to equitable tolling, and that the *Batson* claim is also procedurally defaulted.

[5] We also later were able to obtain the transcript of the entire jury selection.

the most recent one filed on September 4, 2002 was denied on September 30, 2002.

STANDARD OF REVIEW

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an applicant for writ of habeas corpus from a state court judgment bears a significant burden. Section 104 of the AEDPA imparts a presumption of correctness to the state court's determination of factual issues – a presumption that petitioner can only rebut by clear and convincing evidence. 28 U.S.C. § 2254(e) (Supp. 2000). The statute also grants significant deference to legal conclusions announced by the state court, as follows:

> An application for writ of habeas corpus on behalf of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless that adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The United States Supreme Court, in the recent decision of *Williams v. Taylor*, 529 U.S. 362 (2000), interpreted the standards established by the AEDPA regarding the deference to be accorded to state court legal decisions and more clearly defined the two-part analysis set forth in the statute. *Williams*, 529 U.S. at 404-405. Under the first part of the review, the federal habeas court must determine whether the state court decision was "contrary to" the "clearly established federal law, as determined by the Supreme Court of the United States."[6] As defined by Justice O'Connor, writing for the majority of the Court on this issue, a state court decision can be contrary to Supreme Court precedent in two ways: 1) "if the state court arrives at a conclusion opposite to that reached by the [the Supreme] Court on a question of law," or 2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that of the Supreme Court]." *Id.* This "contrary to" clause, however, does not encompass the "run-of-the-mill state-court decisions" applying the correct legal rule from Supreme Court cases to facts of the prisoner's case." *Id.* at 406.

To reach such "run-of-the-mill" cases, Justice O'Connor turned to an interpretation of the "unreasonable application" clause of § 2254(d)(1), and found that a state court decision can involved an unreasonable application of

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[6] The Court explained the clearly established Federal law clause to mean holdings, as opposed to *dicta*, of the Supreme Court's decisions as of the time of the relevant state court decision. *Williams*, 529 U.S. at 412. Moreover, whatever would qualify as an old rule under *Teague v. Lane*, 489 U.S. 288 (1989) will constitute clearly established Federal law, with the caveat that source of the clearly-established Federal law is restricted to Supreme Court jurisprudence. *Id.*

Supreme Court precedent in two ways: 1) "if the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or 2) "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407-408. The Court specified, however, that, under this clause, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly-established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 410.

MERITS

Petitioner asserts that the actions of the prosecutor in striking thirteen African-Americans out of fourteen peremptory challenges in jury selection violated the principles of *Batson v. Kentucky*, *supra*. He also argues that the aforementioned videotape made by the prosecutor, in this case, Jack McMahon, which advocated the striking of African-Americans in selecting a jury, establishes a *prima facie* case under *Batson*. Both arguments, however, fail for the reasons which follow.

In *Batson*,[7] the United States Supreme Court announced the requisite elements of a *prima facie* case of

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[7] The Supreme Court held that *Batson* applies to "all cases, state or federal, pending on direct review or not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987). Thus, *Batson* applies to this case.

purposeful discrimination in the area of jury selection as follows:

> "[T]he defendant first must show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. *Id.* 476 at 96-98, 106 S.Ct. at 1723."

Next, if a defendant makes a *prima facie* showing of discrimination, the burden shifts to the state to produce a race-neutral explanation for striking specific jurors. Then, in light of the prosecutor's explanations, the trial court must determine whether the defendant established a showing of purposeful discrimination. *Id.* at 97-98, 106 S.Ct. at 1723-24.

The facts surrounding what occurred soon after the conclusion of jury selection are as follows:

After the jury was selected on May 2, 1986, petitioner objected to the Commonwealth's use of peremptory challenges based on *Batson v. Kentucky* which had been just decided two days earlier by the United States Supreme Court.

Counsel argued that the Commonwealth had used thirteen of its fourteen peremptory challenges on African-Americans and that the assistant district attorney, Jack McMahon, "seldom, if ever, questioned blacks prior to exercising his peremptory challenges." McMahon responded:

> "I don't know, this is in all honesty, I don't know how many blacks or whites I struck. I know I struck both, that is a fact, your honor. And, in addition, your honor, the defense struck blacks that I accepted. If you will recall in this case, particularly the SEPTA bus driver, the big heavy SEPTA bus driver, I accepted him, the defense struck him. In addition, your honor, there are three blacks on this jury making it clearly different from *Batson*, and I had six strikes left. I did not use all my strikes, in fact, I accepted three black jurors on the case, with strikes left, your honor" (N.T. 5/2/86 at 8-9).

Defense counsel retorted that fourteen peremptory challenges were made by the District Attorney and thirteen were black. As to the one African-American that the defense rejected, he indicated that there was ample reason for that since that venire person had been a victim several times of muggings and robberies and could not have been a fair juror. McMahon answered back:

> "I saw a valid reason for them to strike that black individual, but what I'm saying it shows that the Commonwealth was not interested in race; shows the Commonwealth was interested in a fair jury and we were willing to

accept him despite him being black, yellow, or green" (N.T. 5/2/86 at 11).[8]

In *United States v. Clemons*, 843 F.2d 741, 747 (3d Cir.) (Dicta) (citing *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987), *cert. dismissed*, 487 U.S. 1265, 109 S.Ct. 28 (1988)), *cert. denied*, 488 U.S. 835, 109 S.Ct. 97 (1988), and later in *Jones v. Ryan*, 987 F.2d 960, 970 (3d Cir 1993), the Third Circuit utilized a five-factor test to determine whether a defendant had presented a *prima facie Batson* issue. The five factors are:

1. How many members of the cognizable racial group are in the venire panel from which the petit jury is chosen;

2. The nature of the crime;

3. The race of the defendant and the victim;

4. The pattern of the strikes against racial group jurors in the particular venire; and

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[8] At this time, Judge Gelfand decided not to rule on this issue, but reserved his determination since the *Batson* case had just come out and he didn't have a complete copy of the case, but just an extract of it reported in a newspaper. Once the opinion had been published, petitioner raised the claim in post-verdict motions arguing that he had established a *prima facie* case of racial discrimination. The court went on to reject the claim after argument and briefing (N.T. 12/4/86). Judge Gelfand, however, passed away before he wrote an opinion in this matter.

5. The prosecutor's statements and questions during selection.

Jones, 987 F.2d at 970-971; *see also Deputy v. Taylor*, 19 F.3d 1485, 1492 (3d Cir. 1994).

We will now examine the instant issue under these five factors. It must first be noted that while "[M]ere presence of a single black on the jury would not necessarily prevent a finding of a *prima facie* case." *Clemons*, 843 F.2d at 747; *Jones*, 987 F.2d at 971, "[M]ere disparity of number in the racial make-up of the jury . . . is inadequate to establish a prima facie case." *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 850 (Pa. 1989), *cert. denied*, 498 U.S. 881 (1990); *see also Jones v. Vaughan*, 1996 WL 134802 at 6.

As to the first factor, the petitioner fails to substantiate his claim that the Commonwealth struck thirteen African-Americans. He cites to no record evidence to establish the racial composition of the venire. Respondents indicate in their reply that they don't have transcripts of the jury selection since they are apparently lost, but that the petitioner had not presented any evidence of the racial composition of the venire. However, with some effort, we have obtained such transcripts and they, indeed, fail to reveal any venire person's race.

The record indicates that the Commonwealth had twenty (20) peremptory strikes and the defendants twenty (20) combined. We painstakingly reviewed several hundred pages of the jury selection. This revealed that ninety-four (94) perspective [sic] jurors were questioned and in selecting twelve (12) jurors, the Commonwealth used thirteen (13) peremptory strikes, the petitioner used nine (9), and his co-defendant used seven (7). In addition, in selecting two (2)

alternate jurors, the Commonwealth used two (2) peremptory strikes and the defendants one (1) combined. These transcripts also indicate that not once during the questioning of these prospective jurors was the racial identity of any venire person revealed. (N.T. 4/18/86, 1-32, 4/22/86, 1-244, 4/25/86, 1-113, 4/28/96 [sic], 1-246, 4/29/86, 1-188, 4/30/86, 1-274).

In *Jones v. Vaughan*, *supra* at 4, a case similar to this one, the Honorable Edward Cahn rejected prong one of the *Clemons* test because the racial composition of the venire was unknown from the record. He wrote that "while the record reflects that the petit jury that convicted the petitioner consisted of fourteen white jurors and no black jurors, there is no identification of the race of the persons in the panels, in the venire, or those actually questioned. There is no showing of the race of the persons removed for cause, personal reasons, or by peremptory challenges."

In fact, here, the only finding of fact made by the state courts concerning the racial composition of the venire and/or the jury was made by the Pennsylvania Superior Court on direct appeal. They found that "the record establishes that three of the jurors in this case were black, the defense struck blacks, and the Commonwealth had six peremptory challenges left following the close of jury selection. N.T., 5/2/86, at 9. Accordingly, appellant has failed to establish that the prosecutor exercised peremptory challenges to remove black venire members, as required by *Batson*." *Commonwealth v. Brinson*, No. 00067 Philadelphia, 1997, at p.5.

Moving to the second *Clemons* element (nature of the crime), the crimes committed here were murder and possession of a weapon. In *United States v. Stewart*, 65 F.3d 918, 925 (11th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3359 (U.S.

Feb. 20, 1996), the court found that the crime the defendants were charged with – a racially-motivated hate crime – was a relevant circumstance to be considered in determining whether a *prima facie Batson* case had been made. Here, this is not a factor since the nature of petitioner's crimes does not suggest a racially-based motive for removing African-Americans from the venire since they were not racially-motivated or "hate crimes."

Third (race of the defendant and the victim), petitioner also fails to meet this prong. In *Commonwealth v. Monroe*, 542 A.2d 113, 116 (Pa. Super. 1988), *appeal denied*, 559 A.2d 36 (Pa. 1989), the court determined that the fact that all the parties involved were of the same race "eliminate[s] any clear motivation for discrimination by the Commonwealth." *See also Jones v. Vaughan* at 5. Here, as was determined by the Superior Court, the defendant, the victim, and all the witnesses were African-American.

Fourth (pattern of strikes), as detailed above, the record does not reveal the racial makeup of any venire persons. Thus, it is impossible to determine any pattern of strikes in this case. Furthermore, it would also be difficult to establish any kind of pattern here because of the large number of strikes for cause that were exercised. Out of ninety-four (94) perspective [sic] jurors, forty-eight (48) were excused for cause and the majority of that number for having some type of objection to capital punishment.[9] As *Commonwealth v. Abu-Jamal*, *supra* at 850 held, the makeup of a jury is affected "not only by the prosecutor's use of peremptories, but by the defendant's use of such, by challenges for cause

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[9] The other strikes for cause included perspective [sic] jurors not being able to be fair jurors for a number of reasons and a variety of personal reasons.

(more acute in capital cases because of the *Witherspoon*[10] inquiry) and by jurors' inability to serve for personal reasons."

Fifth and last, regarding the prosecutor's statements and questions during selection, the record again does not support a *prima facie* case of discrimination. A review of the questioning of the ninety-four (94) perspective [sic] jurors reveals not one racially related question by the prosecutor.[11] The record indicates that the court, the two defense counsel, and the prosecutor all asked similar general questions such as religious, moral, or conscientious beliefs against the imposition of the death penalty, schools attended, and the part of the city in which a perspective [sic] juror lived.

There are, simply, no remarks or questions by the prosecutor in the record that evidence a "mind to discriminate." *Batson*, 476 U.S. at 96. Thus, the petitioner has failed to establish a *prima facie Batson* issue under the five

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[10] In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Supreme Court held that a venire person cannot be removed for cause because he or she "voiced general objections to the death penalty." *Id.* at 522. The Court, however, stated that this did not prevent exclusion of a venire person for cause if it is unmistakably clear "(1) that they would automatically vote against the imposition of capital punishment . . . or (2) that their attitude toward the death would prevent them from making an impartial decision as to the defendant's guilt." *Id.* at 522 n.21.

[11] The only racially-related questions at all were from the co-defendant's counsel who occasionally asked if a perspective [sic] juror would be biased because the defendants were African-American. Although this question would seem to indicate that the perspective [sic] juror was not African-American, there simply is no indication in the record confirming this.

Clemons factors on the assertion that the prosecutor struck thirteen (13) of fourteen (14) African-American venire persons.

Since the petitioner cannot support a *Batson* claim on the record, he, in essence, must rely entirely upon the "McMahon Tapes" to support his contention that the prosecutor acted with discriminatory intent in the jury selection process.

Excerpts from the transcript of the "Jury Selection With Jack McMahon" lecture that was given to new Philadelphia assistant district attorneys are as follows:[12]

> . . . "You always want to ask that, what section of the city they live in, because that is a strong indicator to you of their leanings. I mean, well, let's be honest. I mean people that live in North Philly have a different perspective on law enforcement and the government than people that live at K @ A or at Somerton or Chestnut Hill or any other different areas . . . Get a list of all the sections and let people that have been around and try cases say people from Mayfair are good and people from 33rd and Diamond stink. And get to know that. I mean 33rd and Diamond, when I first moved here sounds nice, Hey, 33rd and Diamond. That sounds like a nice neighborhood. But, you know, you don't want any jurors from 33rd and Diamond" (Tr. 20-21).

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12 We are not sure of the time frame that this videotape was viewed by the new assistants. It is a guess that it was some time in the late 1980's shortly after *Batson* was handed down.

Now, I'm going to tell you things that I think over the years that have come to me of doing this. And, again, it's all an individual – anybody tells you anything about trying a case and says it is dogma is wrong because things change and it's different for every individual. But I've had fairly good success with these rules and I think if you stay to them, you'll have fairly good success, too.

And that is – and, let's face it, again, there's the blacks from the low-income areas are less likely to convict. It's just – I understand it. It's understandable proposition. There is a resentment for law enforcement, there's a resentment for authority and, as a result, you don't want those people on your jury. And it may appear as if as if you're being racist or whatnot, but again, you are just being realistic. You're just trying to win the case (Tr. 47-48).

Another factor – I'll tell you, if – you know, in selecting blacks, again, you don't want the real educated ones, again. This goes across the board of all races; you don't want smart people. And, again, but if you are sitting down and you're going to take blacks, you want older blacks. You want older black men and women, particularly men . . . And I've seen DAs who strike them because they're black, and that's kind of a rule, "Well, they're black, I've got to get rid of them." But

these people in my experience are good jurors . . .

The other thing is blacks from the South, excellent. Ask where they're from. You know, if you can tell they're – if they say, "I've lived in Philadelphia for five years," if they're from, you know, South Carolina and places like that, I tell you, I don't ever lose a jury with blacks from South Carolina. They're dynamite . . . And they're on the cops' side. And those people are good.

Again, I think black men are – in my experience, black women, young black women, are very bad. There's an antagonism. I guess maybe because they're downtrodden on two respects, they got two minorities, they're women and they're and blacks . . .

And again, some people say, well, the best jury is an all white jury. I don't buy that, particularly with a black defendant, because you're going to have – you could have reverse reaction there. I think that you need dynamics because you don't want anybody to go back in there – because a lot of times your witnesses are going to be black; most of the time. So you don't want this all white jury to go back in there and say to themselves, "Aw, who gives a shit?" You know what I mean? You don't want that attitude at all, and you may get that king [sic] of reverse racism in your case.

I've always felt that a jury of like eight whites and four blacks is a great jury, or nine and three, because then you're not going to get any of that in there. You're not going to get any of that racist type of attitude because a white guy is not going to sit in that jury and say, "Aw, them people live like this and that" with other blacks sitting in the room . . . (Tr. 55-60).

One other – now I'm sure you're all familiar, if we talk about the case law – I generally don't talk much about case law, but the new case is Batson versus Kentucky. I'm sure you've all become aware of that case. And I think would be in that situation is when you do have a black jury, you question them at length. And on this little sheet that you have, mark something down that you can articulate later time if something happens, because if they – because the way the case is stated, that it's only after prima facie showing you're doing this that it becomes – that the trial judge can then order you to start showing why you're not striking them on a racial basis.

So if – let's say you strike three blacks to start with, the first three people. And then it's like the defense attorney makes an objection saying that you are striking blacks. Well, you're not going to be able to go back and say, oh – and make something up about why you did it. Write it down then and there . . .

> . . . So that if the judge does come to you and says, "What about it McMahon," you can say, "Judge, these are my reasons and I have them marked down here," if he puts you into that situation (Tr. 68-71).

A reading of this transcript and a viewing of the videotape is, indeed, troubling, especially, given the fact that the comments and statements are made by the same assistant district attorney who actually conducted the jury selection in this case. However, this tape, in and of itself, does not prove that he picked *this particular jury* with discriminatory intent (emphasis added).[13] *Batson* instructs us to look at whether the "totality of relevant facts gives rise to an inference of discriminatory purpose." 476 U.S. at 94.

As the above discussion indicates, the "totality" of the facts from the record of the jury selection does not establish a *prima facie Batson* case under the five *Clemons'* factors. In addition, the trial judge plays a "pivotal role" in determining whether a *prima facie* case has been established. *United States v. Casper*, 956 F.2d 416, 419 (3d Cir. 1992), *see also Batson*, 476 U.S. at 97, 98 n.21, 99 n.22, 106 S.Ct. at 1723, 1724 nn. 21, 22.

A trial judge's finding of discrimination largely turns on evaluation and credibility and demeanor of the attorney who exercises the challenge. *Casper* at 419, *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859 (1991) (plurality).

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[13] It must be noted that as twisted as his reasons were, McMahon did not advocate in his lecture the exclusion of all African-Americans from a jury. He stated that older, educated African-American males and African-Americans who grew up or lived in the south were "good" jurors (Tr. 55-58).

Because trial judges' experiences, instincts, and first-hand observations are so crucial, a reviewing court ordinarily should afford their findings "great deference." *Id.* at 1869, *Casper* at 419.

In this case, the trial judge, Judge Gelfand, who presided over the entire jury selection and was in the best position to observe any discrimination, specifically rejected the *Batson* claim after argument in post-trial motions (N.T. 12/4/86 at 17). Furthermore, the Superior Court rejected the claim of discriminatory intent in finding that the Commonwealth accepted three African-Americans despite having a number of peremptory strikes to remove them. *Commonwealth v. Brinson, supra* at 5.

As noted earlier, the AEDPA imparts a presumption of correctness to the state court's determination of factual issues which is only rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e). Here, the petitioner has not provided such and, accordingly, his claim must fail.

Therefore, I making the following:

RECOMMENDATION

AND NOW, this 29th day of October, 2002, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus be DENIED AND DISMISSED. There is no probable cause to issue a certificate of appealability.

BY THE COURT:

/s/_____
CHARLES B. SMITH
UNITED STATES
MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CURTIS BRINSON	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD VAUGHN, et al.	:	NO. 00-6115

MEMORANDUM AND ORDER

Entered: July 31, 2001
Fullam, Sr. J. Filed: July 31, 2001

This habeas corpus case, brought by a state prisoner acting *pro se*, has had a long and complex history. Petitioner, Curtis Brinson, was convicted of first degree murder on May 13, 1986, and sentenced to life imprisonment. At his trial, on direct appeal, and in state PCRA proceedings, petitioner asserted that the prosecutor had improperly exercised peremptory challenges to remove prospective jurors on the basis of their race, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Petitioner was unsuccessful on direct appeal, which terminated when the Pennsylvania Supreme Court refused a request for discretionary review on November 22, 1988.

In 1993, petitioner filed his first PCRA petition, counsel was appointed, and an amended petition was filed in March 1994. The trial court denied relief in January 1995, and that decision was affirmed by the Superior Court in November 1995, and *allocatur* was denied in 1996. In the interim, a Pennsylvania statute established a one-year limitations period for collateral attacks on criminal convictions; the statute provided for a one-year grace period in cases which had become final before the statute was passed. The state

limitations period in petitioner's case therefore ended in January 1997.

Not long afterward, in early 1997, there was public disclosure of the fact that, in a training videotape shown to prospective trial attorneys in the District Attorney's office, the same prosecutor who handled petitioner's trial explained to the trainees the desirability of excluding blacks from criminal juries, and his techniques in doing so. The training tape had apparently been made in the mid-1980s at about the same time as petitioner's trial. The disclosure of this videotape created a minor sensation at the time.

Buoyed by these disclosures, petitioner filed his first habeas corpus petition in this court on March 10, 1997, again asserting the *Batson* issue. Magistrate Judge Charles B. Smith, to whom the matter was referred for report and recommendation, concluded that the state courts should be afforded an opportunity to review this recently-discovered evidence. Judge Smith stated:

> "Though petitioner did bring his *Batson* claim before the state courts during the appeal process, petitioner did not have nor did he know of the existence of the 'McMahon tapes' in order to substantiate this claim. Because the existence of these tapes was only recently disclosed, the petitioner should be given the opportunity to bring this claim before the Pennsylvania state courts again in a subsequent PCRA petition under §9545. It is apparent that these tapes were unknown to the petitioner and could not have been ascertained through the exercise of due diligence. Therefore, there is an available corrective process

> within the PCRA which petitioner could pursue.
>
> "Because petitioner may be able to fall under the exceptions provided in the PCRA, he should first go to the state courts and let them decide on the relevance of the 'McMahon tapes' to his *Batson* claim. Accordingly, since the petition contains exhausted and unexhausted claims, the entire petition should be dismissed [citing *Rose v. Lundy*, 455 U.S. 509]."

I adopted the Magistrate's report and recommendation, and dismissed the petition without prejudice, for failure to exhaust state remedies.

Unfortunately, when petitioner returned to the state courts, those courts refused to consider his claim, deeming it time-barred. Petitioner was relying, not only on the "McMahon tapes" but also upon a statistical analysis recently completed at the University of Pennsylvania Law School, which purportedly further substantiated his claim of racial discrimination. Although acknowledging that the state statute of limitations did not bar claims based on newly discovered evidence, the state courts held that the statistical report did not constitute newly discovered evidence, since the underlying facts had always been matters of public record, and thus could have been presented by petitioner in a timely fashion. The Superior Court opinion noted that the "McMahon tape" existed, and had been publicly released for the first time in 1997 (as part of the procedural history of the litigation), but did not discuss or decide whether it constituted after-discovered evidence.

The dismissal of petitioner's second PCRA petition was upheld on appeal on July 7, 2000. Petitioner then filed the present application in this Court, on December 4, 2000. The matter was again referred to Magistrate Judge Smith, who has filed a report and recommendation agreeing with the arguments of the Commonwealth, to the effect that the petition must be dismissed as untimely under the AEDPA. The Magistrate Judge did not have the benefit of a lengthy "traverse" filed by petitioner at about the same time as the Magistrate's report, nor, of course, of the lengthy and vehement objections to that report which have now been filed by the petitioner.

This case squarely presents the problems discussed by the Third Circuit Court of Appeals in *Morris v. Horn*, 187 F.3d 333 (3d Cir. 1999) as predictable, and by the Second Circuit Court of Appeals in *Zarvela v. Artuz*, ___ F.3d ___, 2001 WL 671762 (2d Cir. June 26, 2001) in a more concrete context: When a "mixed" petition is dismissed pursuant to *Rose v. Lundy*, *supra*, for failure to exhaust state remedies, and the state courts reject further applications as untimely, must a subsequent petition to the federal courts be dismissed, and the AEDPA limitations provision be strictly enforced, on the ground that the statute was not tolled during the pendency of the state application because it was not timely filed?.

In *Morris v. Horn*, *supra*, the Court of Appeals discussed, and did not reject, the creative approach adopted by my colleague Judge DuBois when, in dismissing a "mixed" petition without prejudice for failure to exhaust state remedies, his Order expressly provided that, if petitioner returned to the federal court after exhausting state remedies, he could do so by means of an "amended" petition which would relate back to the filing date of the first habeas application. In the *Zarvela* case, *supra*, the court specifically held that, in such

situations, a District Court should, and perhaps must, simply stay further proceedings on a "mixed" petition, rather than dismiss it. The clear thrust of both of these cases is that the treatment of "mixed" petitions should follow the mandates of *Rose v. Lundy* in a manner which takes into account the changes wrought by the AEDPA.

Applying these principles, I conclude that, in the present case, the petition now pending should not be regarded as time-barred. In the first place, it is now clear, in retrospect, that this Court erred in dismissing petitioner's first federal habeas petition. The *Batson* issue had actually been presented to the state courts on direct appeal and in the first PCRA application. My conclusion that considerations of comity would best be served by permitting the state courts an opportunity to reconsider the issue in light of the recent public disclosure of the McMahon tapes turned out to be unduly generous to the Commonwealth; petitioner's right to seek federal habeas relief should not be lost entirely, merely because of this Court's excessive deference to the state tribunals.

In the second place, even assuming the decision that petitioner had not yet exhausted his state remedies was correct, it is now clear, on the basis of the *Zarvela* case, and also to some extent *Morris v. Horn*, that it would have been preferable to stay, rather than dismiss, the first federal petition.

It is perhaps arguable that, since the Superior Court, by its July 12, 2000 decision, has ruled that petitioner's application was time-barred in the state courts, the petitioner should now be treated as "procedurally barred" from pursuing the matter further in this court. Petitioner did, however, timely raise the issue on direct appeal. In any event, the record shows the required cause and prejudice: This Court's

earlier ruling caused the supposed procedural bar, and petitioner would suffer prejudice if no court ever considers his recently-acquired evidence.

On the basis of the entire record, I am satisfied that petitioner has established a right to equitable tolling of the AEDPA limitations period and/or that the present petition for habeas corpus should be deemed to relate back to the filing date of the first federal petition, March 10, 1997.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CURTIS BRINSON	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD VAUGHN, et al.	:	NO. 00-6115

ORDER

AND NOW, this 31st day of July 2001, upon consideration of the report and recommendation of Magistrate Judge Charles B. Smith, and petitioner's objections, IT IS ORDERED:

1. That the report and recommendation are NOT ADOPTED.

2. This matter is re-referred to Magistrate Judge Charles B. Smith for further proceedings leading to a further report and recommendation addressing the merits of the petition.

/s/
John P. Fullam, Sr. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CURTIS BRINSON,	:	CIVIL ACTION
Petitioner,	:	
	:	
VS.	:	
	:	
DONALD VAUGHN,	:	
AND	:	
THE DISTRICT ATTORNEY	:	
OF THE COUNTY OF PHILA-	:	
DELPHIA,	:	
AND	:	
THE ATTORNEY GENERAL	:	
OF THE STATE OF PENN-	:	
SYLVANIA,	:	
Respondents	:	NO. 00-6115

Filed: June 19, 2001
Entered: June 20, 2001

REPORT AND RECOMMENDATION

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

Currently before the Court is a Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. § 2254, by a prisoner incarcerated in the State Correctional Institution at Graterford, Pennsylvania. For the reasons which follow, it is recommended that the petition be denied and dismissed in its entirety.

I. PROCEDURAL HISTORY

Following a jury trial presided over by the Honorable Eugene Gelfand in the Philadelphia Court of Common Pleas, petitioner was convicted, on May 12, 1986, of first-degree murder and possession of an instrument of crime. Judge Gelfand denied post-verdict motions and sentenced petitioner to life imprisonment on the murder charge, together with a consecutive term of five years probation for the weapons offense. On appeal to the Pennsylvania Superior Court, petitioner alleged, in part, that the prosecutor improperly used his peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). The Superior Court affirmed both convictions, *Commonwealth v. Brinson*, 541 A.2d 1148 (Pa. Super. 1988), and, on November 22, 1988, the Pennsylvania Supreme Court denied allocatur. *Commonwealth v. Brinson*, 553 A.2d 964 (Pa. 1988).

Approximately five years later, on September 27, 1993, petitioner sought relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, *et seq*. The PCRA court appointed counsel, who subsequently filed an amended petition. Upon consideration of the new petition, the PCRA court dismissed it on the merits. The Superior Court affirmed the dismissal, *Commonwealth v. Brinson*, 673 A.2d 399 (Pa. Super. 1995), and, on December 11, 1996, the Pennsylvania Supreme Court denied allowance of appeal. *Commonwealth v. Brinson*, 694 A.2d 619 (Pa. 1996).

In March of 1997, petitioner filed a federal petition for writ of habeas corpus asserting, in part, a *Batson* violation. In support of this filing, petitioner argued that he had after-discovered evidence to bolster his claim. Specifically, he asserted that a videotaped lecture from 1986, which was

publicly released in 1997, revealed the prosecutor allegedly endorsing the use of discriminatory peremptory challenges. Based on a report and recommendation issued by the undersigned, this Court dismissed the petition without prejudice on September 22, 1997, for failure to exhaust state court remedies.

Petitioner returned to the state courts on July 30, 1998, to file a second PCRA opinion, this time alleging a *Batson* violation based on a "newly-discovered" statistical study regarding race-based use of peremptory challenges. After the PCRA court dismissed the petition as untimely, the Superior Court affirmed the dismissal on the grounds that the statistical study did not constitute newly-discovered evidence. *Commonwealth v. Brinson*, 761 A.2d 1243 (Pa. Super. 2000). On November 14, 2000, the Pennsylvania Supreme Court denied allocatur. *Commonwealth v. Brinson*, 766 A.2d 1243 (Pa. 2000).

Petitioner filed the instant Petition for Writ of Habeas Corpus on December 4, 2000, setting forth the following claims for relief:

1. Petitioner's rights to a fair trial were denied by the prosecutor systematically excluding black veniremen from the jury;

2. Trial counsel was ineffective for failing to request a severance of petitioner's case from that of his co-defendant;

3. Petitioner's rights were violated by the Commonwealth's failure to provide complete discovery;

4. Petitioner was denied due process of law by the prosecutor being permitted to question petitioner regarding his post-arrest silence;

5. Trial counsel was ineffective for failing to raise the issue of hearsay testimony of Lt. McGowan;

6. Petitioner was denied a fair trial by the trial court permitting the co-defendant's statement to Deborah Richardson;

7. The closing remarks of the prosecutor were prejudicial.

8. The petitioner's equal protection rights were violated based on racial discrimination in selecting the jury;

9. The state court erred by refusing to grant a hearing concerning the *Batson* violation, which would be supported by the statistical study and the Jack McMahon video tapes.

We now turn to the petition at hand.

II. TIMELINESS

Notwithstanding petitioner's allegation of substantive grounds for relief, at least one procedural obstacle precludes federal review of his claims – timeliness. Under the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA"), enacted April 24, 1996:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.[1]

28 U.S.C. § 2244(d)(1) (1996). If direct review of a criminal conviction ended prior to the statute's effective date, then

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[1] The statute also sets forth three other potential starting points for the running of the statute of limitations, as follows:

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). As petition has not alleged any facts indicating that any of these other starting points should be used, the Court does not consider them.

under Third Circuit precedent, a prisoner has one-year subsequent to the effective date to commence a habeas action. *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998).

The statute, however, creates a tolling exception and notes that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). A "properly filed application" is "one submitted according to the state's procedural rules governing time and place of filing.["] *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998). If petitioner files an out-of-time application and the state court dismisses it as either time-barred or waived, then it is not deemed to be a "properly-filed application." *Morris v. Horn*, 187 F.3d 333, 338 (3d Cir. 1999); *Cohen v. District Attorney for Philadelphia County*, Civ. A. No. 98-136, 1999 WL 358966, *3 (E.D. Pa. June 4, 1999). Notably, § 2244(d)(2) of the AEDPA excludes from the one year period only the time that a properly filed collateral attack is actually under submission. *See Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104, 120 S.Ct. 1846 (2000) ("AEDPA's statute of limitations is not tolled from the time a final decision is issued on direct state appeal and the time the first state collateral challenge is filed because there is no case 'pending' during that interval."); *Flanagan v. Johnson*, 154 F.3d 196, 199 n.1 (5th Cir. 1998) ("Under the plain language of the statute, any time that passed between the time that [petitioner's] conviction became final and the time that his state application for habeas corpus was properly filed must be counted against the one year period of limitation.").

In the case at bar, petitioner's judgment became final on February 22, 1989, ninety days after the date when the

Pennsylvania Supreme Court denied allocatur on his direct appeal.[2] *See Morris*, 187 F.3d at 337 n.1 (judgment becomes final at the conclusion of direct review or the expiration of time for filing such review, including the time for filing a petition for writ of certiorari in the United States Supreme Court.). As this event occurred prior to the effective date of the AEDPA, petitioner received a grace period of one year, starting on the April 24, 1996 effective date, and giving him until April 24, 1997 to file a federal petition for writ of habeas corpus.

On September 27, 1993, petitioner filed his first PCRA petition, which the state courts accepted as timely. As that petition remained pending in the state courts on the commencement of the grace period, petitioner's limitations period was tolled until the Pennsylvania Supreme Court's December 11, 1996 denial of allocatur. Thus, petitioner had until December 11, 1997 to seek federal habeas relief.

Approximately three months later, in March of 1997, petitioner filed his first federal petition for writ of habeas corpus, raising a *Batson* claim based on alleged newly-discovered evidence. Because the evidence had never been presented to the state courts, however, this Court dismissed the petition without prejudice on September 22, 1997, for failure to exhaust state court remedies. As of this date, over nine months of his grace period had elapsed since his federal habeas petition had no tolling effect. *See Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999) (the statutory tolling

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[2] Under S. Ct. R. 13(1), a petition for writ of certiorari from a state court must be filed ninety days after entry of an order from the state's highest court denying discretionary review.

provision set forth in § 2244(d)(2) does not toll during pendency of petitioner's first federal habeas petition.[3]

Petitioner's grace period expired on December 11, 1997. Hence, by the time he filed his second PCRA petition on July 30, 1998, petitioner no longer had any remedies in federal court.[4] Ultimately petitioner filed the current habeas petition on December 4, 2000 – almost three years after his federal time limit expired.[5] As petitioner failed to comply with the one-year restriction, this Court has no choice but to dismiss the request for habeas relief without consideration on the merits.

One opportunity for relief from the time-bar remains for petitioner. The statute of limitations in the AEDPA is subject to equitable tolling. *Miller v. New Jersey State Dept. of Corrections*, 145 F.3d 616, 618 (3d Cir. 1988); *Shendock v. Director, Office of Workers' Compensation Programs*, 893

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[3] Nonetheless, even if we were to toll the statute during the pendency of his initial habeas proceedings, petitioner would have had nine months left to file the current habeas petition. He failed to meet even that extended deadline.

[4] In any event, the second PCRA petition could not act to toll the statute of limitations. The state courts dismissed his second PCRA petition as untimely, making it not "properly filed" under 28 U.S.C. § 2244(d)(2).

[5] Notably, petitioner does assert a claim based on evidence discovered on June 12, 1998. Even assuming *arguendo* that such evidence was, in fact, newly-discovered, 28 U.S.C. § 2244 (d)(1)(D) requires that any habeas claim based on that evidence be filed within one year of its discovery. Petitioner, however, did not file the current habeas until almost two and one-half years later. Consequently, this exception does not apply.

F.2d 1458, 1462 (3d Cir.) (en banc), *cert. denied*, 498 U.S. 826, 111 S.Ct. 81 (1990). Equitable tolling is proper only when the "principles of equity would make [the] rigid application of [of a limitation period] unfair." The petitioner "must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient." *Miller*, 145 F.3d at 618. The Third Circuit has set forth three circumstances permitting equitable tolling: (1) if the defendant has actively misled the plaintiff, (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights, but has mistakenly done so in the wrong forum. *Jones*, 195 F.3d at 159 (citations omitted). "In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the "extraordinary" circumstances required for equitable tolling." *Fahy v. Horn*, 240 F.3d 239, 243 (3d Cir. 2001) (citing cases).

Petitioner now puts forth no reason whatsoever for failing to timely file his petition. As petitioner has far from satisfied the basic prerequisite of demonstrating that he exercised reasonable diligence in investigating and bringing claims, the Court finds no grounds for exercising equitable tolling powers and, thus, dismisses the petition as untimely.

Therefore, I make the following:

RECOMMENDATION

AND NOW, this 18th day of *June*, 2001, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus be DENIED AND DISMISSED.

There is no probable cause to issue a certificate of appealability.

BY THE COURT:

/s/
CHARLES B. SMITH
UNITED STATES
MAGISTRATE JUDGE

EXCERPTS FROM BRINSON'S PETITION FOR POST-CONVICTION RELIEF UNDER THE POST-CONVICTION RELIEF ACT, FILED ON JULY 30, 1998

IN THE COURT OF COMMON PLEAS
PHILADELPHIA, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Respondent	:	CRIMINAL DIVISION
	:	No. 1315, 1316, 1317, 1318, & 1319
v.	:	
CURTIS BRINSON, Petitioner	:	JUNE TERM, 1985

PETITION FOR POST-CONVICTION RELIEF UNDER THE POST CONVICTION RELIEF ACT

Petitioner, Curtis Brinson, who is currently confined at the State Correctional Institution at Graterford, Pennsylvania, submits this petition, through his counsel, for post-conviction relief under Pennsylvania's Post Conviction Relief Act, 42 Pa. C.S.A. §§ 9541-9546 (hereinafter the PCRA).

* * *

STATEMENT REGARDING TIME FOR FILING PETITION

Section 9545 provides that a second PCRA petition must be "filed within one year of the date the judgment becomes final." Nonetheless, § 9545(b)(1)(ii) provides an

exception to this one-year time limit if the petition alleges and the petitioner proves that "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." According to § 9545(b)(2), the time for filing a petition pursuant to this exception is limited in that it must be filed "within 60 days of the date the claim could have been presented." The discussion which follows demonstrates that Petitioner's claims falls within the § 9545(b)(1)(ii) exception for newly-discovered evidence and that the present petition has been filed within the time-frame set forth in § 9545(b)(2).

* * *

To establish his *Batson* claim, Petitioner will rely on the following evidence: (1) Mr. McMahon's exercise of peremptory challenges at Petitioner's trial; (2) the McMahon tape; and (3) statistics regarding Mr. McMahon's exercise of peremptory challenges in other cases prosecuted by Mr. McMahon while he was an assistant district attorney. The last two categories of evidence represent circumstantial evidence concerning Mr. McMahon's exercise of peremptory challenges at Petitioner's trial.

Petitioner obviously had knowledge of the peremptory challenges made by Mr. McMahon at Petitioner's trial at the time of the trial in 1986, and the Petitioner first viewed the Mr. McMahon tape in 1997. The statistics regarding Mr. McMahon's exercise of peremptory challenges in other trials, however, were not "discovered" until June 1998. In April 1998, shortly after agreeing to prepare this petition on Petitioner's behalf, Petitioner's present counsel found the statistics in a secondary source – a Supplement to a Petition for Post-Conviction Relief prepared by the Center for Legal Education, Advocacy & Defense Assistance (Philadelphia, Pennsylvania) on behalf of Harold Wilson in the case of

Commonwealth v. Wilson. Believing that a secondary source was not sufficiently reliable, Petitioner's counsel confirmed these statistics for accuracy, to the extent possible, using primary sources. The task was completed on June 12, 1998, by a student at the University of Pennsylvania Law School as part of the public service requirement at the school, under the supervision of Petitioner's counsel. (Petitioner's counsel, a full-time academic who teaches at the University of Pennsylvania Law School, provides pro bono legal assistance to inmates seeking post-conviction relief.) The statistics were confirmed by obtaining the name of, and identifying information regarding, the venirepersons in each of the cases in the statistical sample and then determining the race of these venirepersons from voter registration data.

In summary, all of the facts upon which Petitioner's claim is predicated were not known by Petitioner until June 12, 1998, and they could not have been ascertained by him earlier than this time by the exercise of due diligence. Hence, since this petition is being submitted in July 1998, it has been filed within sixty days of the date Petitioner's claim could have been presented, and thus the petition is timely filed.

NO. 05-25

IN THE SUPREME COURT OF THE UNITED STATES

DAVID DiGUGLIELMO; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

CURTIS BRINSON,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

Should this Court grant certiorari to review the allowance of equitable tolling in a habeas corpus case where the lower court's judgment is interlocutory in nature; where the tolling issues upon which the Commonwealth seeks certiorari are unlikely to recur; where the habeas petition is timely even under the Commonwealth's own theory of equitable tolling; where the Commonwealth's time-bar arguments are barred by principles of res judicata; and where the Commonwealth disputes the lower courts' factual determinations and the lower courts' application of a properly stated rule of law to the facts?

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COUNTER-STATEMENT OF THE CASE[1]

A. The Trial and Direct Appeal Proceedings.

Curtis Brinson, an African American, was charged with murder and tried in the Philadelphia, Pennsylvania, Court of Common Pleas. Jury selection began on April 28, 1996, two days before this Court decided Batson v. Kentucky, 476 U.S. 79 (1986), and ended on the day Batson was decided. Judge Eugene Gelfand presided at jury selection and throughout the trial. App.-7.

"On May 2, 1986 – after Brinson's jury had been selected but before the trial began--his attorney objected that the prosecutor had violated Batson .... Brinson's attorney stated that the prosecutor, Jack McMahon, had 'exercised fourteen peremptory challenges, thirteen for blacks.' He also asserted that McMahon 'seldom, if ever, questioned blacks prior to exercising his peremptory challenges.'" App. 7-8. Counsel described Batson's three part test, asserted that a *prima facie* case was established, and asked the prosecutor to "come forward with an explanation as to why he exercised his peremptory challenges in the manner he has." NT 5/2/86 at 6 (A111).

In response to the Batson challenge, prosecutor "McMahon did not deny that he

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[1]The Petition for Writ of Certiorari is cited herein as "*Petition*." Petitioners are referred to as "the Commonwealth." The Appendix to the *Petition* is cited as "App." In the Third Circuit, the parties filed an Appendix and Supplemental Appendix, pursuant to that court's rules, which are cited herein as "A" followed by the page number and "SA" followed by the tab letter, respectively. All emphasis herein is supplied unless otherwise indicated. Parallel citations are omitted.

had used 13 of his 14 strikes against African Americans," nor did offer any reasons for his strikes. App. 8, 22. Instead, his "number one" response was that Batson should not be applied "retroactively," i.e., to this jury selection which ended on the day Batson was decided. NT 5/2/86 at 8-9 (A113-14). His "number two" response was to claim he had "accepted" one African American who was struck by the defense, which, McMahon said, showed he was "willing to accept him *despite him being black.*" NT 5/2/86 at 8-11 (A113-16).[2] Finally, McMahon noted that he had not used all of his (twenty) allotted strikes and that there were three African Americans on the jury. App. 8.

Judge Gelfand declined to rule on the Batson claim at that time because no one in the courtroom had a complete copy of the Batson opinion. Judge Gelfand stated that counsel's presentation had ensured that "the record is clear," that the court would "reserve any determination" on the Batson claim, and that counsel should re-assert that claim "at post-trial motions" and the court would address it then. NT 5/2//86 at 11-12

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[2]McMahon's claim that he "accepted" one African American who was struck by the defense was *false*– the African American to whom McMahon referred was struck by the defense *before* McMahon had a chance to accept *or* reject him. See NT 4/28/86 at 133-47 (A153-67). Moreover, this African American potential juror stated during voir dire that he had been the victim of a hijacking and an armed robbery while working as a bus driver, was "a firm believer in capital punishment" and had very strong negative feelings about property- and gun-related crime. NT 4/28/86 at 135-36, 138, 140, 145 (A155-56, A158, A160, A165). Defense counsel explained that he struck this man because "he had been a victim several times of muggings and robberies and it was apparent ... from an examination that that could not be a fair juror." NT 5/2/86 at 10 (A115).

(A116-17); App. 8. The trial proceeded. Brinson was convicted of first-degree murder and sentenced to life imprisonment. App. 8.

As directed by Judge Gelfand, Brinson's counsel again raised the Batson issue in post-trial motions. App. 8. Based on the undisputed record, including that McMahon used thirteen of his fourteen strikes against African Americans, counsel again asserted that there was a *prima facie* case under Batson and the burden was on McMahon to come forward with race-neutral reasons. NT 12/4/86 at 8-9, 14 (A136-37, A142); App. 8-9.

Prosecutor McMahon again failed to give *any* reasons for *any* of his strikes. Instead, despite the fact that he had been on notice since the time of jury selection that the Batson claim would be raised post-trial, he claimed that *he could not recall why he struck anyone*. NT 12/4/86 at 9 (A137) ("I cannot now go back and say why an individual juror was struck"); see App. 8-9.[3]

Judge Gelfand "orally rejected Brinson's Batson argument on the ground that

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[3]McMahon also offered a remarkably erroneous "description" of Batson. McMahon said Batson had limited its holding to *the precise facts* of Batson, see NT 12/4/86 at 9-10 ("Batson is limited to Batson facts and them alone."); id. at 13-14 ("Batson was limited by the Supreme Court to the very fact [sic] of Batson"), when Batson actually set out a framework for evaluating race discrimination claims in every case, see 476 U.S. at 82. McMahon said Batson "made significant note" and "talked at length" about the "fact" that it involved "a Black defendant and a White victim," NT 12/4/86 at 10, 14 (A138, A142), when Batson actually *never mentions* the victim's race. McMahon claimed that the Batson prosecutor used *all* his peremptory strikes, see NT 12/4/86 at 10 (A138), when the Batson prosecutor actually had *six* peremptory strikes, and used *four* of them against African Americans, see 476 U.S. at 83 n.2.

Batson had '*not yet been accepted by this Commonwealth*'" – i.e., Judge Gelfand "believed that he was still bound by pre-Batson Pennsylvania court decisions" that *allowed intentional racial discrimination* in jury selection. App. 9. Judge Gelfand stated:

> [U]nfortunately ... for the defendant in this case ... the law in [Pennsylvania] has not been changed to reflect the view ... [of] Batson ..., so that under the circumstances, this Court has nothing it can do except to be confined to the law as it applies to this Court, and since Batson ... has not yet been adopted by this Commonwealth, this Court sees nothing it can do but deny [the Batson claim.]

NT 12/4/86 at 17 (A145).[4]

Judge Gelfand "died before he could write an opinion addressing Brinson's post-trial motions, and the matter was reassigned" to Judge Edward Blake. App. 9. Judge Blake wrote the following with respect to Brinson's Batson argument:

> [T]he record indicates there were at least three black persons on the jury and the selection of the jury was completed with the prosecutor still having six [peremptory] strikes .... Thus, the record does not show any deliberate, purposeful exclusion of black persons from the jury .... Unfortunately, the trial judge died before writing his Opinion, and, therefore, we are without the benefit of his personal observations as he conducted the voir dire. However, we have ... confidence, based upon the experience, character and

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[4]For an example of the pre-Batson Pennsylvania law Judge Gelfand believed he had to apply, see Commonwealth v. Henderson, 438 A.2d 951, 953 (Pa. 1981) ("it is not unconstitutional error for a prosecutor to challenge a black juror for the reason that the prosecutor believes – validly or invalidly – that a black venireman ... is less likely to be impartial than a white venireman. Put still more reductively, the race, creed, national origin, sex or other similar characteristics of a venireman may be proper consideration in exercising peremptory challenges .... Peremptory challenges ... are ... not subject to scrutiny or examination.").

> reputation of [the trial judge], that he would not allow such a purposeful rejection of black persons solely by [peremptory] challenges as to deny this Defendant a fair jury trial.

App. 9-10 (quoting Judge Blake's opinion). Of course, Judge Blake's expression of "confidence" that Judge Gelfand would not allow "purposeful rejection of black persons" was quite misplaced, since Judge Gelfand's express post-trial ruling was that he was bound by pre-Batson Pennsylvania law that *allowed* such purposeful discrimination.

Brinson appealed to the Superior Court, again raising the Batson claim. The Superior Court affirmed, rejecting the Batson claim based on a *per se* rule that there can *never* be a *prima facie* case "where the victim, the perpetrator and witnesses are black." App. 10 (quoting Superior Court decision).[5] The Superior Court continued:

> In addition, the record establishes that three of the jurors in this case were black, the defense struck blacks, and the Commonwealth had six peremptory challenges left following the close of jury selection.... Accordingly, appellant has failed to establish that the prosecutor exercised peremptory challenges to remove black venire members, as required by [Batson]. An evidentiary hearing on this issue is not required.

App. 10 (quoting Superior Court decision).[6]

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[5]The Superior Court erred when it said all witnesses were black. The prosecution actually called *numerous white* witnesses.

[6]The Superior Court erred when it said Brinson "failed to establish that the prosecutor exercised peremptory challenges to remove black venire members." The undisputed trial record is that McMahon used *thirteen of his fourteen strikes* against African Americans. The Superior Court also erred when it said "the defense struck blacks" (plural). The undisputed trial record is that the defense struck *one* African American.

Brinson raised the Batson claim in a petition for allowance of appeal ("allocatur petition") in the Pennsylvania Supreme Court, which was denied without comment on November 22, 1988. See Commonwealth v. Brinson, 553 A.2d 964 (Pa. 1988).

In sum, as the Third Circuit found, Mr. Brinson fairly presented the Batson claim to all levels of the state courts at trial and on direct appeal.

B. The First State Post-Conviction Proceedings

In September 1993, Brinson filed in the Philadelphia Court of Common Pleas a *pro se* petition for state post-conviction relief under Pennsylvania's Post-Conviction Relief Act ("PCRA"), again raising the Batson claim, and raising several new claims. The Court of Common Pleas denied relief without a hearing and the Superior Court affirmed without addressing the merits of the Batson claim, holding that it was "previously litigated" on direct appeal. See App. 10-11. The Pennsylvania Supreme Court denied allocatur on December 11, 1996. See App. 11; Commonwealth v. Brinson, 694 A.2d 619 (Pa. 1996) (table).

C. The Initial Federal Habeas Proceedings

On March 10, 1997, Brinson timely filed a *pro se* petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, rasing the Batson claim and several other claims he had exhausted on direct appeal and in the PCRA proceedings. See Brinson v. Vaughn, Civ. No. 97-1978 (Fullam, J.); App. 11 & n.5 (describing issues). The habeas petition explained that the Batson claim had been

exhausted, but that the state courts had never allowed an evidentiary hearing on the claim, and requested a federal evidentiary hearing. The habeas petition was filed well within the one year limitation period of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") – Brinson used less than *three months* of his AEDPA year.[7]

Several weeks after Brinson timely filed his federal habeas petition, Philadelphia District Attorney Lynne Abraham released to the public "a videotape entitled 'Jury Selection with Jack McMahon,'" Brinson's trial prosecutor, which had been recorded in 1986, the year of Brinson's trial. App. 11-12.[8] "This tape depicted a training session in which *McMahon advocated the use of peremptory challenges against African Americans.*" App. 12. As the Pennsylvania Supreme Court has observed, the practices taught by McMahon in the videotape "*flout constitutional principles in a highly flagrant manner.*" Commonwealth v. Basemore, 744 A.2d 717, 731 n.12 (Pa. 2000). For example:

> [T]he purpose of voir dire, namely, to select a fair and impartial jury, is denigrated as "ridiculous," in favor of the selection of jurors who will be

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[7]AEDPA was enacted in April 1996. At that time, however, Brinson's "properly filed" first PCRA petition was pending; thus, the AEDPA time was tolled under 28 U.S.C. § 2244(d)(2). The first PCRA proceedings remained pending until December 11, 1996. Brinson's habeas petition was docketed in the District Court just three months later, on March 10, 1997 (the actual filing date was even *before* March 10, when Brinson delivered the petition to prison authorities for mailing, see Nara v. Frank, 264 F.3d 310, 315 n.3 (3d Cir. 2001)).

[8]Abraham released the tape when McMahon was running against her for Philadelphia's elected District Attorney position. See, e.g., "D.A. Defends her Release of Videotape," Philadelphia Inquirer A01 (April 4, 1997); "Abraham's Actions Stun Political World," Philadelphia Inquirer A10, 1997 WL 8694021 (April 2, 1997).

> biased in favor of conviction; various racial and gender stereotypes are described and offered as reasons to discriminate in the selection of jurors; techniques for accomplishing such discrimination are described in detail, including the maintenance of a running tally of the race of the venire panel and the invention of pretextual reasons for exercising peremptory challenges; and a willingness to deceive trial courts to manipulate jury panels to these ends is also expressed.

Id., 744 A.2d at 729; see also id. at 729-32 (quoting McMahon tape).

On May 26, 1997, after the McMahon tape was released to the public, "Brinson filed a motion requesting that the District Court take judicial notice of the new evidence." App. 12; see Motion to Take Judicial Notice of Recent Public Information Concerning Jury Selection Discrimination (docket entry 9 in No. 97-1978) (SA Tab B). Brinson noted, as he had in his habeas petition, that the state courts had never allowed a hearing on the Batson claim; he asked, as he had in his habeas petition, for a federal hearing on the claim; and he suggested that the McMahon tape "would be important evidence" at such a hearing. He did *not*, however, seek to amend his habeas petition in any way.

On July 16, 1997, the Commonwealth filed a "Response to Petition for Writ of Habeas Corpus" ("July 1997 Response") (docket entry 10 in No. 97-1978), in which it asked that the habeas petition "be denied without prejudice and that [Brinson] be *required to return to state court* to litigate" a claim based upon the McMahon tape. Id. at 5.

The Commonwealth based its dismissal request on *misrepresentations* of (1) the

Batson claim in Brinson's habeas petition; and (2) Pennsylvania law:

(1) The Commonwealth suggested that the McMahon tape was part of the Batson claim pled in the petition, see July 1997 Response at 3-4, which was not true – the petition was filed before the tape was even released and Brinson never amended the petition to include tape-based allegations. Thus, the Commonwealth falsely asserted that part of the Batson claim in the petition had never been presented to the state courts.

(2) As to Pennsylvania law, the Commonwealth first (correctly) informed the District Court that the PCRA has a one year limitations period which had *already expired* for Brinson. See July 1997 Response at 4-5. The Commonwealth then asserted that state remedies might nevertheless be available because there is an exception to the PCRA's one year limitation period when "the petitioner alleges and proves that 'the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of reasonable diligence." Id. at 5 (quoting 42 Pa.C.S. § 9545(b)(1)(ii)). The Commonwealth, however, *failed to inform* the District Court that this § 9545(b)(1)(ii) exception applies, as a matter of jurisdiction, *only* when the petition invoking it is "filed within *60 days* of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2). See *Petition* at 5-6 (describing PCRA time-bar). Since the McMahon tape was released on or about April 1, 1997, Brinson's 60 day window for filing a tape-based PCRA petition *had already closed 45 days before the Commonwealth filed its motion to dismiss.*

The District Court referred the case to a Magistrate, who recommended that the petition be dismissed without prejudice, as the Commonwealth requested. See Report & Recommendation (July 30, 1997) ("July 1997 R&R") (docket entry 12 in No. 97-1978). The Magistrate's recommendation was based upon the above-described misrepresentations in the Commonwealth's motion: (1) the Magistrate erroneously believed that the McMahon tape was one of the issues in the petition and, thus, that the petition contained a claim that had not been presented to the state courts; and (2) the Magistrate noted that a McMahon tape-based claim would fit into the § 9545(b)(1)(ii) exception to the PCRA's one year time-bar, but failed to recognize that there is a 60 day limit for filing such claims, which had already expired. See July 1997 R&R at 5-6.

On August 7, 1997, Brinson filed Objections to the Magistrates Report & Recommendation ("August 1997 Objections") (docket entry 13 in No. 97-1978) (SA Tab C). Brinson pointed out that he had already fairly presented his Batson claim to the state courts; he asserted that there were no state remedies available to him; he complained that a forced return to state court would cause him to be "buried ... in a nightmare of procedural ... rulings"; and he begged the District Court to allow merits review of his habeas petition, rather than dismiss it. August 1997 Objections at 4. Fearing that the District Court would nevertheless require a return to state court, Brinson in the alternative asked the District Court to take steps to ensure that he would quickly get state court review – he asked the District Court to "order the state court to appoint counsel

immediately"; to order the state court to "allow a full and fair hearing"; to hold the federal proceedings "in abeyance" during the state court proceedings; and to "check on the progress of the state proceedings every 60 days." August 1997 Objections at 5.

On September 22, 1997, the District Court adopted the Magistrate's report and recommendation, granted the Commonwealth's motion to dismiss, and required Brinson to return to state court. "Unfortunately, the District Court did not note that, by the time of its decision, the PCRA time limit for filing a claim based on newly discovered evidence – 60 days from the discovery of the evidence – had *already passed*." App. 12 (citation omitted). Moreover, the District Court failed to provide any of the procedural safeguards Brinson requested – e.g., his request for counsel to assist him in state court, his request that federal proceedings be held in abeyance, his request that the District Court monitor the progress of the state court proceedings. The District Court denied a certificate of appealability.[9]

D. The Erroneous, Futile Return to State Court

The District Court's dismissal, at the Commonwealth's demand, left Brinson in an untenable position. When a district court dismisses a *mixed* habeas petition on lack-of-exhaustion grounds, the petitioner normally has the option of *omitting the unexhausted*

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[9]At the time of the District Court's ruling, and until March 4, 2004, the Third Circuit did *not allow* district courts to hold federal habeas proceedings in abeyance during state court litigation. See Crews v. Horn, 360 F.3d 146 (3d Cir. 2004). Thus, the issue of whether the federal proceedings should have been stayed rather than dismissed was not "debatable" under then-current law.

claim(s) and proceeding in federal court on the exhausted claims. See Rose v. Lundy, 455 U.S. 509, 510 (1982). Brinson, however, did not have that option because his habeas petition *did not contain and never had contained any unexhausted claims* to omit. The Batson claim in his habeas petition was based *entirely on the trial record*, and had been *fully exhausted on direct appeal*. The District Court had required him to exhaust a McMahon tape-based claim that was *not in his petition*.

At the same time, any PCRA claim based upon the McMahon tape was *already untimely* under the PCRA because, "by the time of [the District Court's] decision, the PCRA time limit for filing [such a claim] ... had already passed." App. 12.

Moreover, before filing a new PCRA petition raising any type of Batson claim, "Brinson felt that he was required to comply with the so-called 'Spence rule,' see Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993), and thus to identify the race of 'the veniremen who had been removed by the prosecution, the race of all the jurors who served, [and] the race of jurors acceptable to the Commonwealth who had been stricken by the defense.'" App. 12-13 (quoting Spence); see also Holloway v. Horn, 355 F.3d 707, 726-27 (3d Cir. 2004) (describing Spence rule). If a Pennsylvania PCRA petitioner does *not* make the detailed record required by the Spence rule, Pennsylvania's courts *refuse to even consider* whether a *prima facie* case exists under Batson. See Holloway, 355 F.3d at 727.

Brinson's trial counsel had established that prosecutor McMahon used thirteen of

his fourteen strikes against African Americans. Trial counsel, however, did *not* make the rest of the record required by the Spence rule.[10] Since the existing record did not establish all the information required by the Spence rule, and the state courts would not consider a Batson claim without this information, Brinson had to find some other way to establish the Spence rule record. And he had to do this while indigent, imprisoned and without counsel.

Placed in this impossible position and facing this overwhelming burden, Brinson diligently tried to make the record required by the Spence rule before filing his PCRA petition. He wrote to Philadelphia's Jury Commissioner in an attempt to secure evidence about the jury panel required by the Spence rule. See Petitioner's Traverse in Response to Respondent's Pleading ("Traverse") at 2 (docket entry 16 in No. 00-6115) (SA Tab D). The Jury Commissioner, however, responded that he could not help without a court order. Since the trial judge was deceased, the Jury Commissioner suggested that Brinson write to then-Administrative Judge John W. Herron for assistance. See Traverse at 2. After receiving this letter from the Jury Commissioner, Brinson immediately wrote to Judge Herron, again requesting information on the jury panel that would allow him to establish the record required by the Spence rule. Judge Herron, however, never responded to Brinson's inquiry. See Traverse at 2.

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[10]There was no reason for trial counsel to make the record required by the Spence rule, because the Pennsylvania Supreme Court did not invent and apply the Spence rule until long *after* Brinson's jury selection. See Holloway, 355 F.3d at 726-77.

Brinson, thwarted in his efforts to obtain the information needed to make the record required by the Spence rule, "wrote to many University asking the law school to assist [sic]." Traverse at 2. Eventually, a professor at the University of Pennsylvania, William C. Tyson, agreed to help. Since the trial record does not contain the information required by the Spence rule, Professor Tyson, like Brinson, was forced to seek other sources that might establish the Spence rule record. Eventually, by using a combination of the voir dire record, voter registration records, and statistical analysis, Professor Tyson was able to partially reconstruct the numbers needed to satisfy the Spence rule; using these numbers, Brinson's PCRA petition was filed in July 1998. App. 13.

In the PCRA court, the Commonwealth raised the 60 day time-bar argument that it had failed to provide to the federal court – the Commonwealth asserted that the PCRA petition was jurisdictionally time-barred under 42 Pa.C.S. § 9545(b) because it had not been filed within 60 days of the release of the McMahon tape. The PCRA court dismissed the petition as untimely, the Superior Court affirmed, Commonwealth v. Brinson, 761 A.2d 1243 (Pa.Super. 2000) (table), and the Pennsylvania Supreme Court denied allocatur on November 14, 2000, Commonwealth v. Brinson, 766 A.2d 1243 (Pa. 2000) (table).

E. The Renewed Federal Court Proceedings

1. District Court: On December 4, 2000, three weeks after the state court denial, Brinson again filed his *pro se* federal habeas petition, again raising the Batson claim and

the other claims that he had timely filed in March 1997.[11] The clerk gave the petition a new docket number, 00-6115, and assigned it to the same Judge as the original filing. See Brinson v. Vaughn, Civ. No. 00-6115 (Fullam, J.).

On June 7, 2001, the Commonwealth moved to dismiss the habeas petition in No. 00-6115 as untimely under AEDPA's one year limitation period, asserting that the AEDPA year ran while Brinson was pursuing the futile state court remedies that the Commonwealth had insisted upon and that the District Court required him to seek. Brinson, still *pro se*, responded to the Commonwealth's time-bar assertion in two ways.

First, Brinson moved in his earlier case, No. 97-1978, to amend the *original* habeas petition that he had timely filed in 1997, with the proposed amendment raising the same claims as the original, timely petition. See Motion for Leave to File Amended Habeas Corpus (docket entry 18 in No. 97-1978) (SA Tab E). Brinson argued that the amendment should be allowed under Federal Rule of Civil Procedure 15(a), which requires that leave to amend "shall be freely given when justice so requires," and that the amendment should "relate back" to the timely filed petition, under Rule 15(c)(2), because it raised the same claims. See Motion for Leave to File Amended Habeas Corpus at 6-7. The Commonwealth *did not oppose* Brinson's motion for leave to amend. The District Court *granted* Brinson's motion for leave to amend. See Order of July 20, 2001 (docket

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[11]The docket shows the petition was entered on December 4, 2000. Under the prisoner mailbox rule, the actual filing date was a few days earlier. See note 7, supra.

entry 19 in No. 97-1978) (SA Tab F). The Commonwealth *did not appeal* the District Court's order, and there has been no further action in No. 97-1978.

Second, Brinson argued, in No. 00-6115, for equitable tolling based upon the above-described history of the proceedings. The District Court agreed, finding on "the basis of the entire record," including the explanations in Brinson's "Traverse" for the timing of the state court filing, see part D, supra, that Brinson had "established a right to equitable tolling." App. 59, 61. The District Court found two factors created a particularly compelling case for tolling. First, the District Court recognized "that *it had erred in dismissing Brinson's first, timely petition.*" App. 13:

> The Batson issue had actually been presented to the state courts on direct appeal and in the first PCRA application. My conclusion that considerations of comity would best be served by permitting the state courts an opportunity to reconsider the issue in light of the recent disclosure of the McMahon tapes turned out to be unduly generous to the Commonwealth; petitioner's right to seek federal habeas relief should not be lost entirely, merely because of this Court's excessive deference to the state tribunals.

App. 60. Second, the District Court stated that, even if it had been appropriate to require state court proceedings, "it would have been preferable to *stay*, rather than *dismiss*, the first federal petition," and it was unfair to penalize Brinson for the fact that the Third Circuit did not then allow such "stay" orders. App. 60.

Having found the habeas petition timely under equitable tolling principles, the District Court denied the petition, including the Batson claim, on the merits. Brinson

appealed to the Third Circuit, and present counsel filed an Application for a Certificate of Appealability which was granted. Present counsel briefed and argued the appeal *pro bono*.

2. Court of Appeals: The Third Circuit panel (Scirica, C.J., Alito & Ambro, JJ.), in a unanimous opinion authored by Judge Alito, agreed with the District Court that *equitable tolling is appropriate* here. The Third Circuit first set forth the applicable law:

> It is settled that [AEDPA's] one-year statute of limitations ... is subject to equitable tolling, see Miller v. New Jersey State Dept. Of Corr., 145 F.3d 616, 618-19 (3d Cir. 1998), but that the doctrine should be invoked "sparingly." Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990). We have said that equitable tolling is proper when the party in question "has in some extraordinary way been prevented from asserting his or her rights." Brown v. Shannon, 322 F.3d 768, 773 (3d Cir. 2003). One such potentially extraordinary situation is where a court has misled a party regarding the steps that the party needs to take to preserve a claim. See, e.g., Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (referring to situation in which "the court has led the plaintiff to believe that she has done everything required of her"); Hallgren v. U.S. Dept. of Energy, 331 F.3d 588, 590 (8th Cir. 2003); Lambert v. United States, 44 F.3d 296, 299 (10th Cir. 1995); Rys v. U.S. Postal Serv., 886 F.2d 443, 447 (1st Cir. 1989). In this case, the District Court held that equitable tolling was justified on this ground.

App. 15; see also App. 15 (circumstances must be "sufficiently 'extraordinary' to justify equitable tolling"); App. 16 (court must "ensur[e] that the doctrine is indeed used 'sparingly' and is not employed to upset the strong concern for finality embodied in" habeas law).

Applying this well-established equitable tolling law, the Third Circuit concluded

that it "would sustain the District Court's [allowance of] equitable tolling under any of the standards used by other courts of appeals." App. 16:

> We conclude that the District Court's mistaken dismissal of Brinson's first petition prevented Brinson in a sufficiently extraordinary way from asserting his rights under the federal habeas statute. As the District Court ultimately recognized, Brinson had fully exhausted his Batson claim on direct appeal. It was therefore error for the District Court to dismiss his first federal habeas petition on the ground that this claim was not exhausted. In dismissing that petition, the District Court reasoned that Brinson's request for judicial notice of the McMahon tape transformed his Batson claim into one that differed from the claim raised on direct appeal, but this reasoning was flawed.
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> First, it is questionable whether Brinson's reliance on the McMahon tape fundamentally altered the previously exhausted claim because the tape merely confirmed the factual predicate of Brinson's Batson claim without changing its legal basis. See Vasquez v. Hillery, 474 U.S. 254, 258 (1986); Stevens v. Del. Corr. Ctr., 295 F.3d 361, 369 (3d Cir. 2002); Landano v. Rafferty, 897 F.2d 661, 673 (3d Cir. 1990). Second, as we explain in part III of this opinion, without the tape, Brinson had a meritorious claim that his trial attorney established a *prima facie* case under Batson and that the state courts violated Batson by failing to move on to the second and third steps of the Batson inquiry. Under these circumstances, the District Court, at a minimum, should have given Brinson the option of going forward with the precise claim that was advanced on direct appeal. See Rose v. Lundy, 455 U.S. 509, 510 (1982) (when petition is "mixed," petitioner must be given "choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court"). Instead, the District Court relegated Brinson to another round of state court litigation that was bound to fail because the 60-day period for raising a claim founded on newly discovered evidence had already passed.

App. 16-17 (footnote omitted).

The Third Circuit considered and rejected the Commonwealth's argument "that Brinson did not act with the requisite 'reasonable diligence' because he was allegedly dilatory in filing his second PCRA petition." App. 17. The Commonwealth had urged the Third Circuit to impose a *per se* rule that "Brinson did not exhibit 'reasonable diligence' because he did not file his second PCRA petition within 30 or 60 days after the District Court's dismissal." App. 17. The Third Circuit found, however, that this rigid, *per se* rule was inappropriate under the circumstances of this case, and that "the District Court did not err in equitably tolling the statute of limitations." App. 18.

Turning to the merits, the Third Circuit easily found a *prima facie* case under Batson. App. 22-24. In making this finding, the Third Circuit *did not consider the McMahon tape* at all. Instead, it limited itself to the Batson claim Brinson raised in his timely 1997 federal habeas petition, based upon the trial record that was before the state courts when they denied the Batson claim at trial and on direct appeal – e.g., McMahon's "stark pattern" of using thirteen of his fourteen strikes against African Americans; his "vague responses" when the Batson claim was raised by defense counsel; his failure to give any reasons for any of his strikes when asked to do so; the fact that his "number one" response was that Batson should not be applied and that his jury selection should be judged by pre-Batson standards that allowed intentional discrimination; his assertion that Batson should be limited to its facts and his misleading statement of those "facts," which suggest his fear of being judged by Batson's actual standards; his false claim that he had

"accepted" one African American struck by the defense; his assertion – about an African American who had been the victim of gun-related crimes, had very strong anti-crime views and was a firm supporter of capital punishment – that he was "willing to accept him *despite him being black*"; and his claim of lapsed memory when the Batson issue was argued post-trial, which is particularly suspicious because he was on notice from the pre-trial proceedings that he would have to answer to the Batson allegations. See App. 23-24; Counter-Statement of the Case § A. The Commonwealth *does not contest* the Third Circuit's *prima facie* case finding.

Applying 28 U.S.C. § 2254(d) to the Batson claim, as required by AEDPA, the Third Circuit found that "the explanations given by the state trial and appellate courts were all 'contrary to' Batson, or at least represented unreasonable application of that precedent," App. 19 – e.g., the trial judge's ruling that Batson did *not apply* in Pennsylvania; the trial judge's application of pre-Batson law that *allowed intentional discrimination*; the subsequent state court judge's deference to a non-existent no-discrimination finding by the trial judge; the Superior Court's *per se* rule that there can *never* be a *prima facie* case when defendant, victim and witnesses are all African American;[12] the Superior Court's patently erroneous statement that the prosecutor did not strike *any* African Americans; the Superior Court's holding that there could not be

[12]Moreover, as stated above, many witnesses actually were *not* African American.

a *prima facie* case because "the defense struck blacks";[13] and the Superior Court's holding that there could not be a *prima facie* case because some African Americans were selected. See App. 19-24; Counter-Statement of the Case § A. The Commonwealth *does not contest* the Third Circuit's ruling that the state court decision was "contrary to" and/or an "unreasonable application of" Batson.

Having found the habeas petition timely, and having found a *prima facie* case of intentional discrimination under Batson, the Third Circuit remanded to the District Court for an evidentiary hearing at which "the Commonwealth should be given the opportunity to provide legitimate reasons for any strikes against African Americans." App. 24-25.

The Commonwealth sought *en banc* rehearing of the panel's unanimous decision, which was denied without comment. The Commonwealth now seeks this Court's certiorari review.

REASONS FOR DENYING THE WRIT

A writ of certiorari is "granted only for compelling reasons." Supreme Court Rule 10. This Court's certiorari jurisdiction is "exercised sparingly, and only in cases of peculiar gravity and general importance." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). There is no reason to grant the writ here.

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[13]Moreover, as stated above, the defense struck just one "black," not *blacks* (plural).

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE OF THE INTERLOCUTORY NATURE OF THE THIRD CIRCUIT'S JUDGMENT.

The Third Circuit did *not* grant habeas relief, nor did it order the District Court to grant relief. Instead, it merely remanded to the District Court for an evidentiary hearing. Under these circumstances, where the judgment is interlocutory in nature, this Court generally does not grant certiorari.[14] There is no reason to deviate from that general rule here. Certiorari should be denied.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE BRINSON'S HABEAS PETITION IS TIMELY EVEN UNDER THE COMMONWEALTH'S THEORY.

Certiorari should be denied because Brinson's federal habeas petition is timely even *under the Commonwealth's own theory* of equitable tolling.

The Commonwealth has never contested that equitable tolling is appropriate for the times during which Brinson had proceedings pending in either state or federal court. Thus, the only periods that could possibly make Brinson's federal habeas petition untimely are those during which nothing was pending in any court. Brinson's out-of-court times are as follows:

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[14]See Virginia Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) (denying certiorari where Court of Appeals remanded for further proceedings in District Court; "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." (citing authorities)); Locomotive Firemen v. Bangor & Aroostook R. Co., 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); Hamilton-Brown, 240 U.S. at 258 ("except in extraordinary cases, the writ is not issued until final decree").

12/11/96 (first PCRA denied) until 3/10/97 (federal habeas filed) = 89 days

9/22/97 (federal habeas dismissed) until 7/30/98 (second PCRA filed) = 311 days

11/14/00 (second PCRA denied) until 12/4/00 (federal habeas refiled) = 20 days

Thus, Brinson's total time out-of-court is 420 days.[15]

The Commonwealth told the Third Circuit that it is appropriate to allow *60 days of equitable tolling* during Brinson's out-of-court time. See Counter-Statement of the Case § E.2; App. 17-18. In this Court, the Commonwealth makes the same allowance for 60 days of out-of-court tolling. See *Petition* at 16. Since Brinson's total out-of-court time is *420 days*, and the Commonwealth allows *60 days* of equitable tolling, Brinson used just *360 days without tolling* and, thus, is *timely* even under the Commonwealth's own theory of equitable tolling.

This Court does not use its certiorari jurisdiction to resolve issues that have no practical consequence for the parties. Indeed, this Court *lacks jurisdiction* under Article III of the United States Constitution to decide such matters. Certiorari should be denied.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE TIMELINESS OF BRINSON'S HABEAS PETITION IS RES JUDICATA.

As set forth in the Counter-Statement of the Case § E.1, Brinson had a two-fold response to the Commonwealth's AEDPA time-bar argument. In addition to arguing for

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[15]In fact, Brinson's total out-of-court time is even *less* than 420 days because the 3/10/97 and 12/4/00 dates are when his petition was entered on the docket, rather than the earlier dates when he delivered the petition to prison authorities for mailing. See note 7, supra.

equitable tolling in the instant case, No. 00-6115, Brinson also moved to amend his original, timely filed habeas petition in No. 97-1978, asserting that leave to amend was appropriate under Federal Rule of Civil Procedure 15(a), and that the amendment "related back" to the original, timely, filing date under Rule 15(c)(2). The Commonwealth did not oppose the motion to amend or Brinson's argument that the amendment was timely because it "related back" to the original filing. The District Court *allowed the amendment.* The Commonwealth did not appeal, and does not present any argument in its *Petition* regarding the propriety of the District Court's grant of leave to amend in No. 97-1978.

Thus, it is undisputed that there is a *timely* habeas petition pending in No. 97-1978, raising exactly the same claims that are raised in the instant case. This timeliness ruling in No. 97-1978, which has never been contested by the Commonwealth, means that the Commonwealth's time-bar argument in the instant case is barred by principles of res judicata. See Wright, Miller & Cooper, 18A FED. PRAC. & PROC. JURIS.2d § 4441 (Res Judicata: Statutes of Limitations) (timeliness ruling in one case is res judicata for timeliness of second case involving same facts). Under these circumstances, certiorari should be denied.

IV. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COMMONWEALTH'S QUARREL IS WITH THE THIRD CIRCUIT'S APPLICATION OF A PROPERLY STATED RULE OF LAW TO THE FACTS.

The Commonwealth's real quarrel is with the lower courts' application of settled

law to the facts of this case, and with the lower courts' determinations of those facts.

A. The Commonwealth claims that the Third Circuit "explicitly refused to consider whether [Brinson] had acted with 'reasonable diligence.'" *Petition* at 8 (emphasis omitted). But, as set forth below, what the Third Circuit actually "explicitly refused" to accept was the Commonwealth's proposed *per se* rule that diligence required a return to state court within 60 days. While refusing to adopt the Commonwealth's *per se* rule, the Third Circuit applied well-established equitable tolling law to the specific facts of this case.

The Third Circuit first set forth well-established equitable tolling law, repeatedly stressing that equitable tolling is only "*sparingly*" allowed under "*extraordinary circumstances*." See Counter-Statement of the Case § E.2 (quoting Third Circuit opinion, App. 15-16). Moreover, *every equitable tolling case* cited by the Third Circuit – this Court's decisions in Irwin and Baldwin; the Third Circuit's prior decisions in Miller and Brown; and other Circuits' decisions in Hallgren, Lambert and Rys – emphasizes that equitable tolling is available only to a "*diligent*" litigant.[16] Thus, the Third Circuit plainly

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[16]See Irwin, 498 U.S. at 96 ("Federal courts have typically extended equitable relief only sparingly. ... We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); Baldwin, 466 U.S. at 151 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); Miller, 145 F.3d at 618-19 ("The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient." (citations and quotation marks omitted)); Brown, 322 F.3d at 773 ("[T]o be entitled to equitable tolling, [t]he petitioner must show that he or she exercised reasonable diligence in investigating and bringing

recognized that equitable tolling is only "sparingly" allowed under "extraordinary circumstances" when the petitioner has been "diligent."[17]

After properly outlining the law of equitable tolling, the Third Circuit described the Commonwealth's argument against equitable tolling in this case: "The Commonwealth contends that Brinson did not act with the requisite 'reasonable

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[the] claims. Mere excusable neglect is not sufficient." (citations and quotation marks omitted)); Hallgren, 331 F.3d at 591 ("Equitable tolling is not an excuse to be invoked by those failing to exercise reasonable diligence."); Lambert, 44 F.3d at 299 & n.1 (stressing "due diligence" requirement); Rys, 886 F.2d at 446-47 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."; denying equitable tolling because court was "not convinced that [plaintiff] acted with the utmost diligence" (citations and quotation marks omitted)).

[17]The Third Circuit has repeatedly said the same thing in other habeas cases, and has denied equitable tolling when it found that the petitioner was *not* "diligent" during exhaustion of state remedies. See, e.g., Pace v. Vaughn, 2003 WL 21754982, *1 (3d Cir. July 30, 2003) (unpublished, text on Westlaw) (denying equitable tolling for time spent exhausting state remedies where petitioner was not diligent; tolling allowed only under "extraordinary" circumstances and when "petitioner has demonstrated that he exercised reasonable diligence in investigating and bringing [the] claims" (quotation marks omitted)), aff'd, Pace v. DiGuglielmo, 125 S.Ct. 1807 (2005); LaCava v. Kyler, 398 F.3d 271, 272, 276, 277 (3d Cir. 2005) (habeas petitioner's "twenty-one month period of passivity [during exhaustion] precludes a finding of due diligence for equitable tolling"; equitable tolling allowed only in "rare situation" when prisoner shows "extraordinary circumstances ... *and* the prisoner has exercised reasonable diligence" (emphasis in original); diligence "obligation does not pertain solely to the filing of the federal habeas petition, rather it is an obligation that exists during the period [the petitioner] is exhausting state court remedies as well"); Jones v. Morton, 195 F.3d 153, 159-60 (3d Cir. 1999) (same analysis; denying equitable tolling where petitioner "made no showing that he that he exercised reasonable diligence in satisfying the exhaustion requirement" after his habeas petition was dismissed without prejudice (quotation marks omitted)).

diligence' ... because he did not file his second PCRA petition within 30 or 60 days after the District Court's dismissal of the first federal petition." App. 17.[18] The Third Circuit then rejected the Commonwealth's *per se* rule, which would never allow more than 60 days of equitable tolling no matter what the circumstances, and held that, under the circumstances of this case, "the District Court did not err in equitably tolling the statute of limitations." App. 18.

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[18]The Commonwealth took the 30 day figure from Crews v. Horn, 360 F.3d 146 (3d Cir. 2004), which "held that, where a District Court stays a mixed petition so that the petitioner can exhaust unexhausted claims, the petitioner must file in the state court within 30 days after the entry of the stay." App. 17-18. But Crews' 30-day rule is premised on four assumptions, none of which apply here: the habeas petition is "mixed"; federal proceedings are held in suspense; the petitioner is told to file in state court within 30 days; and the petitioner is warned that failure to file within 30 days could result in dismissal of his federal proceedings. See id., 360 F.3d at 154. Here, Brinson's petition was *not* mixed; the District Court did not hold the federal proceedings in suspense; the District Court did not tell Brinson to return to state court within any specific time; and the District Court did not warn Brinson that failure to return to state court within a specific time could result in dismissal. Moreover, Crews' 30-day rule is the time that is "normally" deemed "reasonable." Id., 360 F.3d at 154. Here, despite Brinson's diligent efforts, more time was required, as stated above. If the federal habeas proceedings had been held in suspense, as Crews requires, Brinson could have sought leave from the District Court for additional time, based on the specific facts of this case.

The Commonwealth took the 60 day figure from Commonwealth v. Lark, 746 A.2d 585 (Pa. 2000), which "held that, when a ground for filing a second PCRA petition ... arises while a previous PCRA action is still pending, the second petition is timely if it is filed within 60 days after the final resolution of the previous PCRA action." App. 18. But Lark's 60 day rule does *not apply* when, as here, the already "pending" action is a federal habeas proceeding, rather than a prior PCRA proceeding. See Commonwealth v. Whitney, 817 A.2d 473, 477 (Pa. 2003). Moreover, Lark's rigid 60-day rule has nothing to do with equitable tolling – it is a state court jurisdictional requirement imposed by the PCRA statute.

In short, the Third Circuit understands the law of equitable tolling perfectly well, fairly stated that law in this case, applied it to the facts, and rejected the Commonwealth's argument. The Commonwealth dislikes the outcome, but that is not grounds for granting certiorari. See Supreme Court Rule 10 ("certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law").[19]

B. At the same time that the Commonwealth claims the Third Circuit did not consider "diligence," it also claims that Brinson tricked the District Court and Third Circuit into believing he was diligent – i.e., the Commonwealth disputes the facts that were found and relied upon by the lower courts.

As set forth above, Brinson explained to the District Court and Third Circuit that one reason it took him some time to get back into state court was that he needed to compile the "Spence rule" numbers required by Pennsylvania's state court pleading rules for Batson claims; he unsuccessfully tried to do this while incarcerated and

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[19]The Commonwealth also asks this Court to decide if it is an "extraordinary circumstance" when a federal habeas petition "is dismissed by a federal district court because some or all of the claims therein are unexhausted." See *Petition* at 20-22. But the Third Circuit *did not hold* that dismissal of an unexhausted petition is an "extraordinary circumstance." Instead, it held that the "*mistaken dismissal*" of a *fully exhausted* petition that states a *prima facie* case under Batson, without giving the petitioner the opportunity to proceed on the exhausted claim, is the type of "extraordinary circumstance" that may justify equitable tolling. See App. 16-17 (quoted in Counter-Statement of the Case § E.2, supra). This Court does not grant certiorari to decide issues that were not presented to or decided in the lower court.

unrepresented; he eventually obtained assistance from a law professor who was able to reconstruct some of the Spence rule information; and he filed soon thereafter. See Counter-Statement of the Case §§ D-E. The District Court credited this explanation, see App. 59 (District Court relies upon Brinson's Traverse and Objections, which describe his attempts to compile Spence rule information), as did the Third Circuit, see App. 12-13.

The Commonwealth says it "is not even true" that Brinson was gathering Spence rule information; that the "truth is, Brinson was not collecting" Spence rule evidence; that Brinson's second PCRA petition "did not present any new 'Spence' evidence to the state courts" but, instead, presented only "a statistical argument based on McMahon's *other* cases"; and that the "*Third Circuit seriously mischaracterize[d]*" the record when it found facts contrary to the Commonwealth's claims. *Petition* at 17-19 & n.4 (emphasis in *Petition*).

In short, the Commonwealth claims that Brinson pulled the wool over the lower courts' eyes in a "classic example of misdirection," and that the lower courts made a *factual error* when they "uncritically accepted" Brinson's explanation. *Petition* at 16, 19 n.4. This plainly is *not* grounds for granting certiorari. See Supreme Court Rule 10 ("certiorari is rarely granted when the asserted error consists of erroneous factual findings").

Moreover, the Commonwealth is simply wrong when it says Brinson was not really gathering Spence rule information. The Commonwealth bases its assertion on

carefully selected excerpts from Brinson's 1998 PCRA Petition, see App. 73-75, which proffer information regarding McMahon's jury selection in *other* cases. This appearance of other-case-only allegations, however, is created by the Commonwealth's *misleading excerpting*. In fact, Brinson developed and pled in the 1998 PCRA petition *both* other-case evidence *and* evidence about McMahon's strikes *in this case*.

The 1998 PCRA petition plainly states that Petitioner relied upon: "(1) Mr. McMahon's peremptory challenges *at Petitioner's trial*; (2) the McMahon tape; *and* (3) statistics regarding Mr. McMahon's exercise of peremptory challenges in other cases." 1998 PCRA Petition at 8; see also id. at 11 (claim relies upon "statistics regarding Mr. McMahon's exercise of peremptory challenges *in Petitioner's trial*"; the McMahon tape; *and* "statistics regarding Mr. McMahon's exercise of peremptory challenges in other cases"). The 1998 PCRA Petition also makes clear that the "statistical study" upon which it relies was a "a study of sixteen of Mr. McMahon's jury trials, *including Petitioner's case*." Id. at 24.[20]

In describing the *prima facie* case, the 1998 PCRA Petition proffers the same three above-described factors. See id. at 15-25. In particular, regarding "McMahon's Peremptory Challenges *at Petitioner's Trial*," id. at 15 (capitalization in original), the

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[20]The racial information about Brinson's trial and the other cases was developed by "obtaining the name of, and identifying identification regarding, the venirepersons in each of the cases in the statistical sample and then determining the race of these venirepersons from voter registration data." 1998 PCRA Petition at 9.

1998 PCRA Petition uses the study of jury selection *in this case* to proffer: the races of all persons whom McMahon had an opportunity to strike *in this case* (i.e., those who were not excluded for cause or struck by the defense before McMahon had an opportunity to strike or accept); the races of all persons whom McMahon did strike *in this case*; and the races of all fourteen selected jurors and alternates *in this case*. See id. at 17. Thus, the Commonwealth's claim that Brinson tricked the lower courts, in addition to being unworthy of certiorari review, is patently false.[21]

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[21]The Commonwealth makes several other erroneous and misleading assertions about the facts and circumstances of this case. For example, the Commonwealth says the Third Circuit allowed equitable tolling for a "*second* federal habeas petition." *Petition* at 8. But under the well-established law of this Court and the Third Circuit, Brinson's current petition, filed after his prior filing was dismissed without prejudice, is a *first* petition. See Slack v. McDaniel, 529 U.S. 473, 488 (2000); Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997).

The Commonwealth says that when Brinson's timely federal habeas petition was dismissed without prejudice in 1997, Brinson was "warned by the district court that there was a potential time-bar problem." *Petition* at 19. This is false. Neither the District Court nor the Commonwealth ever even hinted that dismissal would create a "potential time-bar problem." To the contrary, the Commonwealth's motion to dismiss the habeas petition without prejudice plainly suggested that Brinson would receive federal habeas review after his state court litigation. See, e.g., July 1997 Response at 4-5 ("Respondents deny that petitioner is entitled to federal habeas review *at this time*. ... The interests of comity and federalism require that [state] remedy be pursued *before federal review will be appropriate*. ... [T]he present petition should be dismissed as *premature*.").

The Commonwealth suggests that Brinson was somehow remiss for not developing the "Spence rule" record at trial or on direct appeal. See *Petition* at 18. But the Pennsylvania Supreme Court did not invent and apply the Spence rule until long *after* Brinson's jury selection and direct appeal were over. See Holloway, 355 F.3d at 726-77 (Pennsylvania Supreme Court first stated the Spence rule in 1993 and first "fully explained" it in 1995).

C. The Third Circuit understands the law of equitable tolling and applied it to the facts of this case. The Commonwealth's quarrel is with the Third Circuit's view of the facts and the outcome of its application of settled law to those facts. Certiorari should be denied.

V. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE ISSUE THE COMMONWEALTH PRESENTS IS UNLIKELY TO RECUR.

The Commonwealth seeks certiorari on an issue that is unlikely to arise again. If similar habeas proceedings were initiated today they would unfold very differently, albeit with the same ultimate result, and would *not* present the issue on which the Commonwealth seeks review.

Suppose that, under current law: (1) a prisoner timely files a fully exhausted habeas petition, as Brinson did in 1997; (2) after the petition is filed, the state releases new evidence relevant to one of the claims in the petition, as the Commonwealth did here; and (3) the prisoner then asks the district court to take judicial notice of the new evidence and points out that the new evidence will be relevant at an evidentiary hearing on the already exhausted claim, as happened here. Under these circumstances, the proper course of action is quite clear, and it has *nothing to do with* the issue the Commonwealth wants reviewed.

First, the district court must decide if consideration of the new evidence requires that the habeas petition be amended. Here, it is clear that *no amendment was needed* because, as the Third Circuit found and the Commonwealth does not dispute: the *already*

exhausted facts pled in the petition establish a *prima facie* case under Batson; the state courts' failure to find a *prima facie* case is contrary to and/or an unreasonable application of Batson; and, thus, an evidentiary hearing is required at which the prosecutor may give race-neutral reasons for his strikes (Batson step-two) and at which the court will make an ultimate finding of intentional discrimination *vel non* (Batson step-three). Since a hearing is required *without* the McMahon tape, there plainly is no reason to require amendment of the petition to include it.[22]

Second, assuming that the petition must be amended, the timeliness of any proposed amendment would be governed by this Court's recent decision in Mayle v. Felix, 125 S.Ct. 2562 (2005). Here, if amendment had been needed or sought, which it was not, it plainly would have been timely, since the McMahon tape "relates back" to the

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[22]Moreover, the *tape may be relevant and properly introduced at the hearing* even though it is not part of the petition. If McMahon gives race-neutral reasons at step-two, the tape will be relevant at *step-three*, as rebuttal to those proffered reasons. For example, the tape would be relevant at step-three because McMahon on the tape urges "*invention of pretextual reasons*" for race-based strikes, Basemore, 744 A.2d at 729; the tape would be relevant at step-three if McMahon claimed he had no motive to strike African Americans because the case was not particularly racially charged, since McMahon on the tape urges race-based jury selection in *every case*, see Transcript of McMahon tape at 60-62 ("[D]on't design a jury for a particular case. ... [Y]our goal is the same regardless of what kind of case you have. ... You pick the same jury. I don't care if it's a black, white, Puerto Rican, Chinese or what. You pick the same jury."); the tape would be relevant at step-three if McMahon claimed that selection of three African Americans showed a lack of intent to discriminate, since McMahon on the tape says a jury with three African Americans is ideal, see Transcript of McMahon tape at 59 (quoted in Basemore at 730) ("I've always felt that a jury of like eight whites and four blacks is a great jury, or nine and three").

Batson claim that was already exhausted and pled in the petition. See Mayle, 125 S.Ct. at 2572.[23]

Third, if amendment is needed and allowed, the district court must then decide if the resulting amended petition is "mixed," i.e., if the amendment added an unexhausted claim. Here, if amendment had been needed, sought and allowed, which it was not, it would *not* have created a "mixed" petition, for two independent reasons found by the Third Circuit: (1) no state court remedies were available because the 60 days allowed by the PCRA had already expired before the District Court ruled, e.g., App. 12, 17; and/or (2) the McMahon tape did not "fundamentally alter[] the previously exhausted claim because the tape merely confirmed the factual predicate of Brinson's Batson claim without changing its legal basis." App. 16-17 (citing Vasquez v. Hillery, 474 U.S. 254, 258 (1986) and similar Third Circuit precedent).

Finally, assuming there is an amendment to the petition, and that the amendment makes the petition mixed, neither of which occurred here, the district court under these circumstances would then have to decide if it should *hold the federal habeas proceedings in suspense*, rather than dismiss without prejudice, while state court remedies are exhausted. See Rhines v. Weber, 125 S.Ct. 1528 (2005). Here, the District Court and

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[23]Moreover, a McMahon tape-based claim would have been timely even if deemed to be an altogether new claim. See 28 U.S.C. § 2244(d)(1)(D) (claim timely if filed within one year of "the date on which the factual predicate of the claim ... could have been discovered through the exercise of due diligence").

Third Circuit found, and the Commonwealth does not contest, that Brinson's federal proceedings would have been stayed under Rhines and under Third Circuit law as it has existed since Crews v. Horn, 360 F.3d 146 (3d Cir. 2004) was decided in March 2004. See App. 59-60 (District Court); App. 14 (Third Circuit).

Thus, under current practice, this case would unfold very differently from the way that it did, and the issues that the Commonwealth wants this Court to review would not arise. Instead, the issues would involve application of the rules for amendments and "stay" orders, as set forth in this Court's recent decisions such as Mayle and Rhines. Moreover, the ultimate outcome here – a timely habeas petition – would be required by current law. This Court does not use its rarely granted certiorari jurisdiction to solve yesterday's problems. Certiorari should be denied.

CONCLUSION

For the reasons stated above, certiorari should be denied.

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NO. 05-25

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID DiGUGLIELMO; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

CURTIS BRINSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY

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ARGUMENT IN REPLY

In the Petition for Writ of *Certiorari*, petitioners explained that the Third Circuit was wrong to equitably toll the habeas deadline without even considering whether Brinson acted with reasonable diligence. Petitioners also explained that the Third Circuit's error contradicted decisions from other Circuits, as well as three intervening decisions from this Court. In his response, Brinson raises a host of arguments about tangential matters, but he does not dispute the central point: Federal courts must always consider diligence as a prerequisite to equitable tolling. At the very least, then, this matter should be remanded for application of this basic principle.

Petitioners offer the following argument in reply; the issues are numbered in the order that Brinson has presented them.

I. The timeliness issue is appropriate for immediate review: It is squarely presented, it is separable from the rest of the case, and it is dispositive.

Brinson first argues that this Court should not grant the writ because the matter is not final. Response at 22 & n.14. But this Court often reviews matters that are interlocutory in nature, where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Stern, Gressman, Shapiro, & Geller, *Supreme Court Practice* 259 (8th ed. 2002) (citing cases). In fact, this Court often grants certiorari in non-final habeas matters that pose an important timing issue, including two cases near the end of last term. See Mayle v. Felix, 125 S. Ct. 2562, 2573-74 (2005) (amendments to habeas petition that implicate new facts or law cannot "relate back" to

original filing date when one-year habeas deadline has passed); Bell v. Thompson, 125 S. Ct. 2825, 2831-32 (2005) (Court of Appeals abused discretion by staying mandate, issuing amended opinion, and remanding for hearing five months after Supreme Court denied rehearing of *certiorari* denial).

Brinson's case, like Mayle and Bell, presents an important and clear-cut timeliness issue that is ripe for immediate review. It is obviously separate from the merits of Brinson's jury discrimination claim, and it is a threshold question – if Brinson's habeas petition is time-barred, then there will be no need for further proceedings. On the other hand, if this Court does not grant *certiorari*, this decades-old litigation will continue into the foreseeable future, despite the Third Circuit's clear mistake in failing to apply the habeas deadline as required by law.

II. Brinson's petition is untimely, because he filed it after the deadline and cannot demonstrate that he qualifies for equitable tolling.

Brinson's next argument consists of an odd (and plainly incorrect) re-calculation of the habeas deadline. He adds up all of his "out-of-court" time, and measures it against the AEDPA[1] 365-day time limit, plus an extra sixty days of tolling for going back-and-forth between federal and state court. Not surprisingly, he announces he has met this new, imaginary deadline by five days. Perhaps more surprisingly, he declares that this calculation is consistent with the Commonwealth's theory of the time limit. Response at 22-23.

[1] The Anti-Terrorism and Effective Death Penalty Act of 1996, which included among its provisions the one-year habeas deadline.

But this calculation is not consistent with the Commonwealth's theory; nor is it consistent with the habeas statute, or this Court's precedent. The application of the habeas deadline, as defined by 28 U.S.C. §§ 2244(d)(1) and (2), is straightforward. Brinson's judgment became final before the passage of the AEDPA, so the one-year "grace period" applies,[2] and normally that would mean that the one-year habeas deadline would run from AEDPA's effective date, or April 24, 1996. On that date, however, Brinson was litigating a "properly filed" petition for state collateral review, so the time was tolled while that state petition was pending. 28 U.S.C. § 2244(d)(2). Brinson's state collateral petition ceased to be pending on December 11, 1996, when the Pennsylvania Supreme Court affirmed the denial of collateral relief, and so the tolling defined by § 2254(d)(2) ended on that date, and the one-year habeas deadline began to run. The deadline was *not* tolled by Brinson's first federal habeas petition – that is settled law. Duncan v. Walker, 533 U.S. 167, 181-82 (2001). That means that the AEDPA deadline passed on December 10, 1997, and Brinson's second habeas petition – the subject of this appeal – was late by several years.

Brinson's confusion arises because he does not understand the difference between *statutory* tolling (tolling specifically authorized by the statute during pendency of "properly filed" state collateral petitions) and *equitable*

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[2] The Courts of Appeals, including the Third Circuit, have uniformly adopted a one-year grace period for criminal judgments that became final before AEDPA's effective date. See Duncan v. Walker, 533 U.S. 167, 183 & n.1 (2001) (Stevens, J., concurring in part and concurring in the judgment) (collecting "grace period" cases).

tolling. To qualify for equitable tolling – assuming there is such a thing – Brinson must at least show that he acted diligently, but was nevertheless prevented from filing sooner by some extraordinary circumstance. Pace v. Diguglielmo, 125 S. Ct. 1807, 1814 (2005).

Equitable tolling is the only issue here, because there is no question but that Brinson otherwise missed the deadline. In fact, the issue here is even more narrow: This case now turns on whether Brinson has a sufficient explanation for his ten-month delay between the dismissal of his 1997 federal habeas petition, and his next filing in state court. Brinson tries to change the subject, by complaining that he was treated unfairly, that he was misled, that he should have been warned about the possibility of untimeliness. Petitioners disagree that Brinson was unfairly treated, but even assuming that he was, this is no longer the issue. In September of 1997, the federal district court dismissed Brinson's first habeas petition without prejudice, so that he could exhaust his latest claim in state court. He did not file in state court until the end of July, 1998. This long delay matters, and Brinson is not entitled to equitable tolling unless he can show that he acted with diligence and was nevertheless prevented from filing earlier. But there is no plausible way to equitably toll all of this time.

III. The timeliness of the petition is not "res judicata" by virtue of an improper, duplicative habeas petition.

According to Brinson, his 1997 federal habeas petition, which was dismissed that same year, was later re-activated and amended in 2001 without opposition or appeal from the Commonwealth, and these amendments are therefore timely by virtue of "res judicata." Response at 23-

24. This is a new argument, not considered by the Third Circuit.[3] Moreover, no other court has mentioned these "amendments" for several years. This argument is also entirely specious.

What happened is this: The district court dismissed Brinson's first habeas petition, without prejudice, on September 22, 1997. After the state courts denied relief, Brinson returned to federal court and filed a new petition, with a new docket number, in 2000. The new petition was assigned to a Magistrate, who concluded that it was time-barred, and issued a Report and Recommendation to that effect on June 19, 2001. In response, Brinson filed objections with the district court; but he *also* filed a motion for leave to amend his 1997 petition. This was just a different way of posing the same issue – if the Magistrate was correct about the time-bar, then the amendments would also be untimely.[4] Brinson's attempt to amend was also

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[3] In fact, in his principal brief before the Court of Appeals, Brinson even conceded that his attempt to amend the 1997 petition was improper: "Although he cannot relate his second pro se habeas petition back to his first pro se habeas petition ... [Brinson's] case is uniquely suited to equitable tolling ..." Brief for Appellant, Nos. 02-4466 and 02-4479, at 57. He abruptly changed tactics in his reply brief, where he made the present "res judicata" argument for the first time. By that point, of course, it was too late for the Commonwealth to respond, and the Third Circuit did not address this new theory.

[4] See Mayle v. Felix, 125 S. Ct. 2562, 2574-75 (2005) (amended habeas petition cannot "relate back" to original filing date so as to satisfy AEDPA deadline, where amendments plead new facts or law); U.S. v. Duffus, 174 F.3d 333, 337 (3d Cir. 1999) (same). Brinson's proposed "relation back" is even more problematic, because Brinson's first petition was *dismissed*; at the time of his *(continued ...)*

confusing and improper, because he was already litigating the new petition that contained the very same claims – this was simply duplicative litigation.

In any event, the district court decided the timeliness issue on October 2, 2001, concluding: "I am satisfied that petitioner has established a right to equitable tolling of the AEDPA limitations period *and/or that the present petition for habeas corpus should be deemed to relate back* to the filing date of the first federal petition, March 10, 1997." Brinson v. Vaughn, No. 00-6115 (E.D. Pa. October 2, 2001), Slip Op. at 6-7 (emphasis added). This is the very timeliness issue that the Commonwealth eventually appealed to the Third Circuit, and which is now before this Court.

Brinson's "res judicata" argument thus makes little sense. The timeliness issue has not ever been waived. There is no logical principle that would preclude this Court from reaching the issue.

IV. The Third Circuit's failure to consider Brinson's failure to act diligently is more than a minor factual quibble.

Brinson insists that the Commonwealth's complaints are minor, factual, and incorrect – certainly not worthy of *certiorari*. His arguments, however, are misleading.

A. The Third Circuit specifically refused to consider whether Brinson acted diligently in his return to state court.

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motion to amend, there was nothing pending to "relate back" to, as Brinson conceded in his opening brief before the Court of Appeals. See *supra* n. 3.

Brinson constructs an elaborate argument that the Third Circuit actually *did* examine Brinson's diligence, and merely rejected the Commonwealth's proposed "*per se*" rule that all habeas petitioners who wish to exhaust additional claims in state court must do so within a specific amount of time. Response at 25-28. This argument might be worth debating, if it were true; but it is not true.

The Commonwealth argued below that Brinson had not acted with diligence in his return to state court. As a guideline, the Commonwealth noted the Third Circuit's rule that 30 days is a reasonable time for initiating such litigation.[5] The Commonwealth also pointed out that the Pennsylvania statutory deadline for collateral petitions based on "new facts" is 60 days, so allowing more than that for equitable tolling purposes would be difficult to reconcile with state law. But because Brinson took *five times longer* to file his second state collateral petition, he was not conceivably entitled to equitable tolling. This is common sense. The Third Circuit, however, refused even to consider these arguments: "[Brinson] had no obligation to file in state court *at all*. Consequently, he cannot be faulted for failing to file such a petition within any of the time periods suggested by the Commonwealth." App. 18 (emphasis in original).

Simply put, that amounts to a refusal to apply the reasonable diligence standard to Brinson. That is a clear, important mistake that is worthy of *certiorari*.

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[5] See Crews v. Horn, 360 F.3d 146, 154 (3d Cir. 2004). This same guideline was cited with approval by this Court in Rhines v. Weber, 125 S. Ct. 1528, 1535 (2005).

B. When Brinson finally returned to state court, his late second petition for collateral review did not rely on "new" evidence from his own case. Brinson's excuse for his delay in returning to state court is that he was busy collecting evidence about the race of prospective jurors in his own case, and then he "confirmed" it for accuracy. As soon as he was sure about these facts, he says, he filed his second petition for collateral review.

Once again, this is not true, or at least it is not what he told the state courts. Brinson told the state courts that the "new" information came from other cases, not his own. App. 74-75. This is a fact; it is part of the record.[6]

The Third Circuit uncritically accepted Brinson's story without meaningful examination, probably because the court considered all of this to be irrelevant. Indeed, the court did not discuss Brinson's explanation *at all* during its discussion of equitable tolling, instead concluding that *it did not matter* how long Brinson took to file in state court. App.

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[6] The exact language in Brinson's late PCRA petition, as he attempted to explain why he missed the state deadline, was as follows:

> Petitioner [Brinson] obviously had knowledge of the peremptory challenges made by Mr. McMahon at Petitioner's trial at the time of the trial in 1986, and the Petitioner first viewed the Mr. McMahon tape in 1997. The statistics regarding Mr. McMahon's exercise of peremptory challenges in other trials, however, were not "discovered" until June 1998.

App. 74.

18.[7] At the very least, Brinson's story must be reviewed carefully in order to justify tolling.

As evidence that he delayed filing in state court because he was collecting evidence about his own case, Brinson repeatedly insists that he eventually *did* make allegations about his own trial in his second state collateral review petition. Response at 30-31. Well, *of course* he made such allegations – that is the whole point of a Batson claim. If there were no error at his own trial, then he would not be entitled to relief. The question is, however, what part of Brinson's claim was *new*, and why did he take so long to collect this information? Brinson admitted to the state courts that the race of potential jurors in his own case was not "new" information, and he tried to excuse his lateness by arguing that it took him time to collect (and "interpret" and "confirm") statistics from *other* cases. App. 74. But that evidence was not necessary to a claim of jury discrimination, and in fact it is irrelevant. McCleskey v. Kemp, 481 U.S. 279, 308-309 (1987) (disapproving of statistical analysis of other prosecutions as method of proving presence of discrimination in a particular case). That is presumably why Brinson has changed his story.[8] As a result, Brinson has no compelling basis for equitable tolling.

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[7] The Third Circuit only discusses Brinson's activities during the ten-month gap in its recitation of the case's procedural history. App. 12-13. This comes well before the court's discussion of equitable tolling. The only explanation given by the court for its tolling decision is that the 1997 petition should never have been dismissed, so Brinson was under no obligation to act diligently. App. 16-18.

[8] Brinson also insists that the district court did not warn him about a possible time-bar problem in state court when it dismissed his first habeas petition. Response at 31 n.21. But the district court *(continued ...)*

V. New legal developments have underscored the importance of the Third Circuit's error.

Finally, Brinson argues that the circumstances in this case are "not likely to recur" and the issue is not worthy of certiorari. Response at 32-35. He insists that the legal landscape has changed under Mayle and Rhines, and that similarly situated habeas petitioners will no longer be in danger of losing their chance at federal review when they go back to state court to exhaust new claims. But the question here – whether habeas petitioners must litigate with diligence when they return to state court – is just as important now as ever, and in fact these recent cases clearly support the request for *certiorari*.

This Court held in Rhines that, under some narrow circumstances, federal habeas petitioners are entitled to a stay of federal proceedings (rather than a dismissal) as they attempt to exhaust new claims in state court. But even under Rhines, stays are generally disfavored; district courts will still dismiss many habeas petitions as "mixed" (that is, containing both exhausted and unexhausted claims) and inevitably some of these courts will later second guess themselves. In such cases, the petitioner will still have to show that he acted diligently to exhaust his claims despite the district court's earlier "mistake," the very issue explicitly avoided by the

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and the Commonwealth both discussed the state deadline at length before the 1997 dismissal, and this deadline contains a 60-day window for claims based on previously undiscoverable facts. While the district court opined that Brinson could meet this exception, no one suggested that he could do so forever. It was Brinson's responsibility to return to state court in a timely fashion, or at least to act diligently and *try* to comply as best he could.

Third Circuit here. More importantly – and the Commonwealth discussed this at length in the Petition – under Rhines, even petitioners who obtain a federal stay are obligated to act with diligence as they return to state court, or risk eventual dismissal. 125 S. Ct. at 1535. Thus, as the Commonwealth explained in its Petition, Rhines is an important new development which undermines the "blank check" analysis of the court below.

Brinson's reliance on Mayle is even more puzzling. There, this Court explained that prisoners cannot amend their federal habeas petitions to include new facts or law once the one-year AEDPA deadline has passed. 125 S. Ct. at 2574-75. Thus, Mayle underscored the importance of the deadline, rather than the contrary. Furthermore, the holding in Mayle was limited to amendments to properly filed habeas petitions, rather than new petitions (like Brinson's). Where an earlier petition has been *dismissed*, and the AEDPA deadline has passed, Mayle does not remotely suggest that there need be no diligence analysis.[9]

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[9] Brinson also seems to suggest that, if Mayle had been the law in 1997, he would not have had to go back to state court at all. Response at 33-34. But Mayle did not purport to change exhaustion analysis. The fact remains that Brinson's allegations about his prosecutor's videotape were new; the state court was the proper place for brining such a claim in the first instance; other petitioners brought such new claims in state court; and Brinson could have done so, too, if he had not waited too long.

CONCLUSION

For the reasons set forth above, as well as for the reasons explained in the Petition, petitioners respectfully request that this Court grant the Petition for Writ of *Certiorari*.

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